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A

TREATISE

OF THE

RELATIVE RIGHTS AND DUTIES

OF

BELLIGERENT AND NEUTRAL POWERS,

IN

MARITIME AFFAIRS.

IN WHICH THE

PRINCIPLES OF ARMED NEUTRALITIES, AND THE OPINIONS OF HUBNER AND SCHLEGEL ARE FULLY DISCUSSED.

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INTRODUCTION.

IT is now more than two centuries ſince the nations of Europe began to recover themſelves from the groſs and brutal maxims which formerly governed and diſgraced them. While the whole world was in arms, and the wild burſt of ferocious and unreflecting courage deſtroyed all before it, and deſpiſed or oppreſſed the milder arts of peace, it availed little, that ſome few were to be found more enlightened than the reſt, who endeavoured to prove that there were rules of duty beyond the mere force of power. For, while the cloiſtered learning of the times was confined to the humble range of manuſcript communication, and religion, the only bond, or at leaſt the trueſt ſanction of our duties, had maddened into enthuſiaſm or evaporated in ſuperſtition, there was little room to expect improvement from the only ſources whence improvement can ariſe. Accordingly, the potentates of the earth, far from profiting by their intercourſe with one another, were the ſlaves alternately of vengeance, avarice, or

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ambition; and the right of the ſtrongeſt, ſo far from being diſguiſed as a principle, was almoſt the only principle profeſſed.

The Reformation, however, and the natural tendency to improvement, brought men at length to truer maxims; and the art of printing, by facilitating the means of real knowledge, achieved almoſt a new order of things. Then began the ſtates of the world to embrace more juſt conceptions of the nature of their reciprocal duties, and to enquire, even with anxiety, whether there was not ſome high obligation, ſome ſettled principles of action, founded in a nobler origin than the brutal impulſes of paſſion or intereſt which had hitherto governed them. Religion, learning, and philoſophy, all combined, under the auſpices and direction of an illuſtrious ſet of men, to teach nations, as they had before taught individuals, that they were to be governed by a ſcheme of morals founded in the obligations of juſtice, and ſanctified by the revealed commands of their Maker. Amongſt theſe, Grotius led the way, and roſe to ſo proud a height of eminence, as to leave all rivals far behind him. The rules for action which he laid down were ſo clear and preciſe, ſo deeply founded, upon ſuch firm and ſound bottom, and ſo applicable, beſides, to almoſt all the caſes which human ingenuity could imagine, or human viciſſitudes ſupply, that, with a very few exceptions indeed, there is ſcarcely a poſition of

of his which can be combated with ſucceſs, much leſs overthrown. At the ſame time he was ſo ably ſeconded and illuſtrated by his ſucceſſors in his noble ſcience, during the whole of the ſeventeenth century, and almoſt during the whole of the laſt, that one would think the law of nations would now be well underſtood in all its points and bearings, and that it had gradually riſen to that height of perfection which other ſciences have acquired. Much, however, it ſeems, remains to be done.

It has been well obſerved, that ſtates are moral agents as well as men; for they are compoſed of men, have the ſame paſſions and temptations to do ill, together with the ſame reaſon and antidotes to temptation. They owe alſo the ſame obedience to the Creator and Governor of all things, can pretend to nothing, and ought to yield every thing, as they ſuppoſe he would rule and exact it from a ſimple individual. But, unhappily for mankind, from the varying powers of their underſtandings, the influence of prejudice, the claſhing of intereſt, and, above all, from the want of ſome ſovereign and all-powerful tribunal to pronounce with authority, and execute with effect, it is no eaſy thing to eſtabliſh a common code of laws which all may conſult, and to which all ſhould defer. In the war for the Auſtrian ſucceſſion, a *philoſophic* king of Pruſſia choſe to attempt an alteration in the neutral code, not by endeavouring, as nations more intereſted

than his had done,* to obtain it by boon and expreſs ſtipulations from Great Britain, but by claiming a right, founded on reaſoning, ſuch as it was, to carry enemy's property in his ſhips free from ſearch; a claim which fell ſtill-born to the ground, from the irreſiſtible argument which ſtifled it in its birth. †

The cloſe of the eighteenth century, however, has exhibited a conteſt upon the ſame point of law, and founded in the ſame *philoſophy*, of ſuch extreme magnitude in its conſequences, agitated in a manner ſo tremendous for the parties, and likely to bring along with it ſuch a train of evils, ending in miſery and blood, that all men muſt naturally make it an anxious ſubject of their inveſtigation, and be eager to inquire into the reaſoning and authorities that can ſettle it, if indeed it can now be granted to us, that reaſoning and authority can ſettle it at all.

The pretenſions and principles of what is now well known by the name of the "*armed neutrality*," have been formed for ſome years. Whether they have been formed upon a juſt foundation,

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* Holland, for inſtance, who laboured it under the direction of their ableſt miniſters, after their war with Cromwell, till it ended in the treaty of 1674. See Thurloe, *paſſim*; De Witt and Boreel's Letters, and Temple.

† See the Duke of Newcaſtle's Letter, &c. &c.

or

or a foundation any thing like juſt; whether they can bottom themſelves in any *well reaſoned* theory, or find ſupport from any *examples*, (and without a *well reaſoned* theory, ſupported by the force of *example*, it is in vain that you look for the law of nations, or any other law,) is the momentous object of the following enquiry. If the pretenſions of the North can be made out convincingly, if even, *incerto marte*, their favourers can diſcuſs the queſtion, the world will pauſe before they fly to the terrible deciſion of arms. If, however, the whole ſhould be uſurpation, ſet up to acquire unlawful advantages to them, and ending in the total deprivation of the lawful means of defence to us, it then becomes that object for which the nation muſt contend to the end of her reſources, or ceaſe to be a nation that has any reſources at all. Mankind will allow, that the ſubject is full of intereſt; and the criſis of the times is ſuch, that Britons at leaſt, if not the Dane and the Swede, will give it all their anxious attention.

In that well-known criſis of the American war, when the whole exertion of France was pointed to the acquiſition of a navy able to cope with us ſingly, without which it had become an axiom of their Government, that they could not pretend to give law to the world; their policy was, as it will always be with the inferior Belligerent at ſea, to turn the whole of their marine reſource into

into the means of offence; leaving their trade, and the ſupply of ſtores, for a time, to the protection of Neutrals, if any Neutrals can be hardy enough to riſk the conſequences of an interference. The Dutch, corrupted to the core by the love of gain, which had often made them ſupply their own enemies with the means of annoyance,* had always riſked, and always ſuffered for it. Denmark and Sweden, as bold in ſpirit, but not ſo vitiated by the corruptions which the mere unqualified genius of trade muſt ever generate, had ſhewn much diſpoſition to interfere; but either checked by a ſenſe of juſtice, or tempering their diſpoſition with prudence, they had never ventured into an open defiance of the exiſting law, nor upon the bold aſſertion of a new one, which no nation in Europe had yet admitted. It was reſerved for the aſpiring power of Ruſſia alone to lead the way to an innovation, which, whether, as ſhe aſſerted, it was *a natural ſyſtem, founded*

* As at Bergen-op-Zoom, which Lowendahl himſelf confeſſed he could not have taken for want of ammunition, had not the enemy been ſo good as to ſupply him. Many defend the Dutch for this in point of policy, without obſerving that it can only not tend to ruin, when the power that aſſails is ſo ſuperior to that which buys, that it may laugh at its timid efforts. This could never happen from the Dutch towards the French, who have ſo often endangered their very exiſtence. Who that was to fight with his ſuperior in ſtrength and ſkill, would lend him the ſword that was to work his deſtruction? Reverſe the ſituations, and the caſe is perhaps poſſible.

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on juſtice, remains now to be ſeen, but which her own miniſter, in his memorial to the States General, allows, '*was to be eſtabliſhed and legalized* '*in their favour.*'

That memorial ſtated in terms, that the ſame invitation had been made to the courts of Copenhagen, Stockholm, and Liſbon, '*in order, that* '*by the united endeavours of all the neutral mari-* '*time powers, a neutral ſyſtem, founded on juſ-* '*tice, might be eſtabliſhed and legalized in favour* '*of the trade of neutral nations, which by its real* '*advantages might ſerve for a rule for future* '*ages.*' *

What real advantages are here ſpoken of, except thoſe accruing to the neutral and inferior Belligerent alone, it will not be eaſy to determine; it is certain that no advantage at all, ſpecious or real, could ariſe to him who had overcome, or nearly overcome, his enemy at ſea; and as certain that the ſyſtem, though claimed to be natural, was yet *to be* eſtabliſhed and legalized, and conſequently, by an implication as powerful as inevitable, had never *yet* been eſtabliſhed or legalized.

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* See the Memorial of Prince Gallitzin to the States General, April 3, 1780.

Now

Now what was this ſyſtem founded in Nature, but which for many hundred years the ſearchers into natural right had never thought of eſtabliſhing as law? It conſiſted of four grand articles.

Firſt. 'That all neutral ſhips may freely 'navigate from port to port, and on the 'coaſts of nations at war.

Secondly. 'That the effects belonging to the 'ſubjects of the ſaid warring powers 'ſhall be free in all neutral veſſels, ex-'cept contraband merchandiſe.

Thirdly. 'That to determine what is meant 'by a blocked-up port, this is only to 'be underſtood of one which is ſo well 'kept in by the ſhips of the power 'that attacks it, and which keep their 'places, that it is dangerous to enter into 'it.

Fourthly. 'That neutral veſſels ſhall not be 'ſtopped, except for juſt cauſe, and upon 'clear evidence; that judgment ſhall be 'given without delay; that the proceſs 'ſhall always be uniform, prompt, and 'legal; and that beſides damages to 'thoſe who have ſuſtained loſs, ample 'ſatisfaction ſhall be made for the inſult "done

'done to the flag of the contracting 'powers.' *

This was the claim in 1780. This is the claim, as far at leaft as Denmark has declared itfelf, in 1800.† This alfo, together with another, the privilege of the flag, are the claims both of Denmark and Sweden. Ruffia, in addition to other fuppofed and particular injuries, co-operates, or rather leads the way, to the affertion of thefe claims, *which all fay are in their nature indiffoluble*;‡ and for this the whole North are in arms! Preffed, therefore, as we are in this gigantic conteft, in addition to the now undivided weight of our moft powerful and bitter enemy, in the moft juft war that was ever undertaken; I have thought that it would be no unacceptable fervice to my countrymen—perhaps no unacceptable fervice to our confederated enemies themfelves, if the whole queftion could be laid at once before them, with all its train of authorities and cafes, in as much brevity as is conffiftent with the fubject.

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* See the Treaties between Ruffia and Denmark, and Ruffia and Sweden, June 1780.—Martin's Treat. tom. ii.

† See Count Bernftorff's anfwer to Mr. Drummond's note, December 1800.

‡ See the Preamble to the Treaty 4th (16th) Dec. 1800, between Ruffia and Sweden, which is 'made in order to give a *new* '*fanction* to thofe principles of their neutrality which are 'in their nature indiffoluble.'

With

With reſpect to the fourth article of the Ruſſian Treaties, 1780, it will not be at all neceſſary to diſcuſs it; as there is nothing in it that militates againſt juſtice: only we may obſerve, that when coſts and damages are awarded, ſatisfaction for the whole injury, both to the individual and the flag, is intended to be made. As to the third, it ſeems nearly correct as a general rule. Where it is not entirely ſo, the enlightened underſtanding, and admirably conſiſtent deciſions of a man whom I ſhould exalt myſelf by endeavouring to praiſe, muſt ſatisfy even the framers of the armed neutrality themſelves upon the ſubject.*

In addition however, to the important, and to us fatal claims ſet up in the three firſt articles, there are a variety of others regarding the rights of ſearch, detention, and judicature, interwoven with them ſo intimately as to make it impoſſible to ſeparate them in a treatiſe like this. Theſe have found of late moſt ſtrenuous advocates in many of the public men of the times; the high-toned and certainly able miniſters of the courts in queſtion; and civilians and profeſſors of public law, whoſe works, though I mean the reverſe of ſhewing them diſreſpect, have produced no ſort of

* See a variety of caſes of blockade; and Sir William Scot's Judgments, in Dr. Robinſon's Admiralty Reports. The rule of deciſion there, is, that there muſt be an actual blockade, together with notice of it to the party, or to thoſe whoſe duty it was to inform him, and an attempt at its violation.

conviction in my mind. And I cannot help thinking they have owed the reputation they enjoy on the continent, more to the flattering unction which they give to very favoured positions, than to the ſkilful management of the argument, or the ſoundneſs of the deduction. Amongſt theſe, *Hubner*, who wrote in the war of fifty-ſix;* and *Schlegel*, who has lately detailed, with augmented ſophiſtry, (if I may uſe ſuch an expreſſion) the arguments of his precurſor, have been too much boaſted of, not to merit a conſiderable portion of notice; but *Sir William Scott* muſt forgive me the preſumption of attempting, after him, to handle an argument which he, from his high place, has given to the world, but which I muſt neceſſarily touch upon in reviewing thoſe who think they have reviewed him.†

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* De la Saiſie des Batemens Neutres, &c.—He was a Daniſh civilian, and Conſeillier de Conférence.

† I allude to profeſſor Schlegel's Treatiſe, Sur la Viſite des Vaiſſeaux Neutres *ſous Convoi*, ou Examen impartial du Jugement prononcé par le Tribunal de l'Amirauté Angloiſe, 1799, &c.

A TREATISE,

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TREATISE, &c.

THE alleged rights of Neutrals in maritime affairs, which I propoſe to examine, may be divided into ſeveral propoſitions, or general heads.

I. That free ſhips make free goods, from which a corollary is derived, that Neutrals have a right to coaſt from port to port, and to trade from colony to colony, and from the colonies to the mother country of Belligerents, without being liable to ſearch or detention, except for contraband of war.

II. That contraband is confined to articles of excluſive and immediate ſervice in war.

III. That war means military war and commercial peace; that is, that no private property can be the ſubject of prize.

IV. That the courts of the capturing Belligerent are not competent to entertain queſtions concerning Neutrals captured or detained upon the high ſeas.

V. That the right of ſearch is not a natural right, and is confined abſolutely to the mere inſpection of papers.

VI. That the flag of the ſtate is tantamount to all documentary parol and ocular evidence, and excludes all right of ſearch whatever.

VII. That whatſoever is done under cover of the flag, immediately excludes the ſuppoſed juriſdiction of the courts of prize, and becomes matter of repreſentation between State and State.

PROPOSITION I.

THAT, BY THE LAW OF NATURE, FREE SHIPS MAKE FREE GOODS, AND NEUTRALS HAVE A RIGHT TO COAST FROM PORT TO PORT, AND TO TRADE FROM COLONY TO COLONY, AND FROM THE COLONIES TO THE MOTHER COUNTRY OF BELLIGERENTS, WITHOUT BEING LIABLE TO SEARCH OR DETENTION EXCEPT FOR CONTRABAND OF WAR.

THE argument on either ſide of this queſtion proceeds preliminarily upon the ſuppoſition, that this is or is not the *genuine*, *natural*, and *primitive* law, diſtinct from all limitation by treaty, and wholly unmodified by convention.* In this ſtate of things, the Belligerent is ſuppoſed to ſay that he has a right to annoy his enemy by every means in his power, and conſequently to ſeize his property wherever he may find it, even on board the ſhips of a friend. On the other hand, the Neutral contends, with equal earneſtneſs and equal appearance of reaſon, as a general doctrine, that he has a right to carry on his trade with either and both the Belligerents; that their quarrel ought not to affect him; and that every attempt to trench upon that right is an invaſion of his neutrality. Here, then, is an apparent conflict of two apparently equally perfect rights, and how to reconcile them is the difficulty to be unravelled. If good faith,

* Schlegel, *paſſim*.—See alſo the third article of the late treaty, 4th December, 1800, between Ruſſia and Sweden. 'And where-'as it is reſolved, that whatever, by virtue of the foregoing article, 'can be deemed contraband ſhall be excluded from the commerce of 'Neutral Nations: in like manner, his Majeſty the King of Sweden, 'and his Imperial Majeſty of all the Ruſſias, will and determine 'that all other merchandiſe ſhall be and remain free.—*And in order 'that the general principles of the Law of Nature, of which the free-'dom of Trade and Navigation, as well as the rights of Neutral Na-'tions, are the immediate conſequence,* may be placed under a com-'petent and ſure ſafeguard, they have reſolved no longer to delay 'that voluntary explanation, from which they have hitherto been 'reſtrained by motives of their ſeparate and temporary intereſts,' &c. &c.

however,

however, be brought into the inquiry, that firmeſt and beſt auxiliary to every ſerious inveſtigation, but little of intellect will, perhaps, be neceſſary to ſettle the point.

For the more convenient diſcuſſion of the ſubject, the argument may be divided into three parts, or ſections. Firſt, as to the reaſoning drawn from mere common ſenſe and the principles of general equity: Secondly, as to the reaſoning drawn from authority and cuſtom: Thirdly, as it may be collected from treaties.

SECTION FIRST.

THE whole myſtery of this queſtion, as far as I have been able to judge, proceeds from either a wilful or an ignorant miſrepreſentation, on the part of the neutral champions, *of the real pretenſions of the Belligerent*, which, they ſuppoſe, amounts to an entire interdiction of the fair rights of commerce *which they enjoyed before the war*. All the argument, and the declamation that accompanies the argument; the attempts at new theories, ſet off with the arrangement and forms of ſyſtem and ſcience; the unfounded and moſt eaſily refuted accuſations brought againſt us, from ſcantlings of our hiſtory, or crude and miſtaken, if not wilfully miſrepreſented, accounts of our judicial proceedings; —all this, I ſay, turns upon this radical miſtake, that we wiſh to prevent and cut off the whole trade of Neutral Powers, or at leaſt make ſuch inroads into it, beyond the mere deprivation of contraband, as ſhall render it nugatory, *even when carried on for their own account*. Once, and once only, for the ſpace of near two centuries, ſuch an attempt was made, and, I freely own, by this country, in conjunction with Holland, when, in the treaty of Whitehall,* they

 endeavoured

* Aug. 12, 1689. By the ſecond article it is ſtated, that as ſeveral Kings, Princes, and States in Europe, are already engaged in a war againſt the moſt Chriſtian King; and that they have already

endeavoured to prevent all commerce whatſoever with France in the war of 1689. But though there was, perhaps, power ſufficient, had we ever been ſolemnly diſpoſed to conſider that power is right, as many four ſpirits have moſt fooliſhly imputed to us; yet we ſaw the injuſtice into which we had been ſurpriſed, and, to uſe the language of Vattel, (blaming us on this very queſtion) 'Les deux puiſſances 'maritimes reconnoiſſant que les plaintes des deux couron-'nes* etoient bien fondées, leur firent juſtice.'†

With this one exception, Great Britain has never attempted, ſince the law began to be ſettled, after the frequent altercations upon it in the ſixteenth century, to impoſe fetters upon that part of neutral commerce which is *innoxious*, and which had in reality exiſted before a ſtate of warfare, unleſs in the *authorized* caſes of contraband, and of carrying enemy's property. Let it be remembered, therefore, that the queſtion on the part of the Belligerent is not, as has groſsly been ſuppoſed, whether he has a right to interfere with the Neutral; but merely whether he cannot prevent the Neutral from interfering with him? In other words, whether, when the former *extends* the bounds of his trade, not *with*, but *for* a Belligerent; not only purchaſes what is wanting for his own conſumption, or ſells his uſual peace-ſupply of articles; but ſells to him articles which may be

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ready prohibited, or will in a ſhort time prohibit all commerce with France, 'it is agreed between his ſaid Majeſty of Great Britain and the ſaid Lords the States General, that if, during the courſe of this war, the ſubjects of any other King, Prince, or State, ſhall undertake to traffic, or have any commerce with the ſubjects of the moſt Chriſtian King; or if their veſſels or ſhipping are met with in their paſſage to the ports, havens, or roads, under the obedience of the moſt Chriſtian King; the ſaid veſſels, ſhipping, merchandiſes, or wares, ſhall, in the caſe above-mentioned, be attacked and taken by the Captains of men of war, privateers, or other ſubjects of the King of Great Britain and the Lords of the States General, and ſhall, before proper judges, be condemned for lawful prize.'

* Denmark and Sweden. † Droit des Gens, l. iii. ſec. 112.

eaſily

eaſily converted into the means of annoyance; or even *turn-carrier* for his oppreſſed friend, who uſes the ſurplus ſtrength which is thus afforded him againſt his opponent; whether, in ſuch caſe, the other Belligerent has no reaſon to be offended, and to reclaim thoſe rights which the pretended Neutral is diſpoſed to deny him.

This, in fact, is the true ſtate of the queſtion; and with this magnet to guide our wanderings, this towering landmark to point our exertions, we ſhall be able, I think, to weather the tempeſt which has been only brewed by ingenious ſophiſts, or artificial ſtateſmen.

The argument for the propoſition in queſtion affects to bottom itſelf upon the freedom of navigation, the liberty of the ſeas, and the natural power and liberty of ſailing over the world. The right which a people has to uſe its induſtry in whichever way it ſeems beſt to them; the neceſſity, founded in Nature, for commerce, in order to improve the *deſigned* intercourſe of mankind; the equal dignity and independence of Sovereign Powers; the unlawfulneſs in a war, however juſt, of converting the privilege of annoying an enemy into the power of abuſing a Neutral; all theſe, and many others of inferior force, are the arguments by which it is endeavoured to ſupport the poſition.* They are founded, it is ſaid, upon principles of univerſal equity, which form the great and everlaſting code for the government of Sovereigns.† Is it fair, therefore, ſay they, becauſe two nations go to war, that others, who are impartial in the diſpute, are to ſuffer in their rights? Are they to be curtailed in the means of their ſubſiſtence, or the uſual exchange of their commodities, which employ and feed ſo many thouſands of defenceleſs and innocent perſons, merely becauſe others have

* Schlegel, Hubner, paſſim. † Hubner, i. 105.

choſen to quarrel; or becauſe, before the war, one of the Belligerents has been uſed to derive advantages from the neutral trader, is the latter inſtantly to be invaded and ſtripped, in order the better to invade and ſtrip the former? Theſe queſtions have often been aſked, and have as often been anſwered. In 1780 they were aſked with a kind of triumph; and at this moment they are aſked at the head of thouſands of armed men. Not the leſs weighty, nor the leſs firm, however, will be the anſwer; for, whatever may be the event, it muſt always be founded in truth.

In truth, then, there is no ſort of occaſion to diſpute any one of theſe points; becauſe, even if they could be controverted as general poſitions, without any ſpecific application, which it is allowed they cannot, *they all elude and go beſide the real pretenſion.*

All that we have to examine, ſays Hubner, is, whether Belligerent States have a right *to prevent Neutrals from trading with their adverſaries*; or whether the latter may ſtill continue their commerce with the Belligerent parties, upon the ſame footing as in times of peace.*

Now, with ſubmiſſion to him, this is not all that we have to examine, for if it was, much of the enquiry might be ſpared.

The queſtion aſked by the Belligerent is of a very different nature. It is not whether he has a right to prevent Neutrals from trading with his adverſary, but, neither more nor leſs than, whether Neutrals do not claim to go infinitely beyond the rights of their trade; whether, in their anxiety to preſerve privilege on the one ſide, a real injuſtice is not worked on the other; whether, in ſhort, all the advantage is not thrown on the Neutral party, which wholly

* Hub. chap. 1. ſ. 1. page 1.

near a

burſts aſunder the ties of impartiality, and converts the cautious Neutral into a dangerous enemy ?

Subject to theſe queſtions, indeed, it is not the intention, and according to the improved maxims of modern law, it never was the claim of the Belligerent to interfere with the Neutral. But that ſecurity againſt theſe is as much the natural right of the Belligerent, as the privileges contended for belong to the Neutral, no one will pretend to deny. For, wherever there is a conflict of rights, one or other, or both, muſt yield ſomething, and then the right can only be perfect, that is, can only be aſſerted, *ſubject to the diminution occaſioned by the other*. Throughout all human ſociety, and all human life, it muſt ever be ſo; we muſt recollect, that the moſt perfect ſtate of civil liberty itſelf which man can form, is always a ſtate of reſtriction ſomewhere: every man that is born in the world trenches upon the *perfect* liberty of ſome other man, and could we unpeople the earth, or turn the theoriſt into the deſert, for the purpoſe of enjoying the perfection of liberty, he never would be able to obtain it, on account of the tigers that would conteſt it with him.

We ſee, then, that it is not true, becauſe the rights of commerce are founded in Nature, becauſe the ſea is free to all, and becauſe men have a right to profit of their induſtry, that theſe rights are to extend to ſuch an unqualified height, as never to be modified on any occaſion, and even ſo as to encounter and defeat the rights of others. Let us rather liſten to the rational and liberal Vattel, who, ſpeaking of the illegality of contraband, and at the ſame time of the rights of trade, ſays, 'the nations who 'renounce it in war ſuffer, it is true, but ſuffer from neceſſity:

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[a] Droit des Gens, l. iii. ſ. 3.

'the Belligerent does not oppoſe their rights, but ſimply aſ-
'ſerts his own; and if the two rights are incompatible, it is
'the effect alone of *inevitable neceſſity*.*' After all, then, this is a common caſe, met with under every order of ſociety, beyond the control of man, as he is, and founded in the nature of things. It cannot be illuſtrated better than by directing our attention to a celebrated maxim of our municipal law '*Cujus eſt ſolum ejus eſt uſque ad cœlum*' is, for example, founded in very true principles of juſtice; but as it is palpable, how eaſily, if carried to its utmoſt extent, it might work the greateſt injuſtice, it is modified and rendered perfect by the addition of that other part of it, '*ita ut alienum non lædas.*'

The diverſified claſs of caſes, and varied amplification of the ſubject, which this maxim alone, *thus guarded*, would generate in every enquiring mind, would furniſh of themſelves abundant matter to clear all miſt from this part of the ſubject. I ſhall content myſelf, therefore, with referring for what is wanting to the well reaſoned theory of the Earl of Liverpool, on the Rights and Duties of Neutral Nations, a work to which the viſionaries of the *neutral code*, as it is called, have in vain attempted to furniſh an anſwer.†

In granting, therefore, the fair and reaſonable enjoyment of their privileges to Neutral Nations, there muſt always be added the fair and reaſonable caution, that they uſe them ſo as not to hurt the Belligerent; and that I may not ſeem to entrench myſelf in generals 'ubi ſæpe verſatur error,' I would add, that they have certainly no right to uſe them in any one, the ſmalleſt degree of proportion, *more* than they did in times of peace, nor even in ſo great a degree, if ſuch

* Droit des Gens, l. iii. ſ. 3.

† See the Diſcourſe on the Conduct of the Government of Great Britain in reſpect to Neutral Nations, by the preſent *Earl of Liverpool*.

augmented,

augmented, or the ordinary uſe of them bears immediate miſchief to either Belligerent.

For example, they may increaſe their purchaſes to any amount in the Belligerent countries, provided their own conſumption requires it, and provided they remain domiciled in their own country. But if they perſiſt in carrying, much more, if they extend their faculty of carrying for the Belligerent, where the latter was in the habit of carrying before; and if, in conſequence, he is enabled to come to the battle, and to ſtand the ſhock of war with augmented ſtrength, which he never would, nor could have poſſeſſed without it, I ſee little or no difference between this and an actual loan of military aſſiſtance. All the diſtinction is, that he ſubſtitutes his own people in the place of taking foreigners; for every man, which the Neutral lends to his trade, enables him to furniſh a man to his own hoſtile fleets. In other words, it enables him to meet his enemy with undiminiſhed forces, and yet preſerve entire his ſources of revenue; when, if it was not for this conduct of the Neutral, either the forces or the revenue of the Belligerent muſt inevitably be diminiſhed!

This deduction, I think, is ſo clear, that the moſt unenlightened ſavage, or children in their infant ſtruggles with one another, would inſtantly, taught as it were by Nature, ſee its propriety, and act upon it as a principle. We often, indeed, betake ourſelves to the Indian's untutored mind, or the child's ſelf-taught ſprings of action, in order to diſcover what we think is the natural law: and I ſhould have no objection to ſubmit theſe diplomatic chicaneries (as they have been called), in other words, theſe plain and obvious caſes of duty, which militate againſt thoſe who depart from all duty, to the prompt deciſion of uninſtructed Nature. Even Hubner himſelf, who ſuppoſes that he has eſtabliſhed a new code in the law of nations, relative to Neutrals, which, he tells

tells you, was omitted in all the codes that preceded him, contends no farther, than that they ſhall be allowed to carry on their trade as in times of peace; and this with the exception of contraband. But, according to our princples, the ſame reaſon which applies to contraband, applies to all *nocent* caſes whatſoever. Hubner, in explaining contraband, ſays, that Neutrals were in the habit of carrying a particular ſpecies of commodity before the war, which becomes prohibited by the very ſtate of war, becauſe it aſſiſts one or other, or both the Belligerents. We ſay, precifely in the ſame manner, that they have been in the habit, not of carrying a particular commodity, but ſimply of *carrying* before the war; which, if perſiſted in after the war, muſt aſſiſt one or other, or both the Belligerents: and, exactly upon the ſame principle, therefore, is this alſo forbidden.

Let us review Hubner, in his very definition of Neutrality. 'Toute neutralité conſiſte dans une *inaction entiére* rélativement á la guerre, et dans une impartialité 'exacte et parfaite, manifeſté par les faits a l'egard des 'Belligérans; en tant que cette impartialité a rapport à 'cette guerre même, et aux moyens directs de la 'faire.'*

Again, in the fourth grand diviſion of the duties of Neutrality, he ſays, 'Le grand devoir de tout Etat Neutre, 'c'eſt quil doit faire tout ſon poſſible pour établir la paix; 'et que pour cet effet il doit employer ſincèrement ſes 'bons offices, *a fin que la partie leſée obtienne ſatisfaction*,

* Hub. p. ii. c. ii. f. 1. See alſo p. i. c. iv. f. 4. 'Et en 'effet je ne vois pas par quelle raiſon les Etats Neutres devroient 's'interdire leur commerce ordinaire avec les Nations qui ſont la 'guerre, ou en vertue de quoi celleci pourroient leur prohiber de 'trafiquer avec chacune d'elle, comme en tems de Paix pouvu 'qu'ils abſtiénnent de tout ce que a un rapport direct a la guerre; 'c'eſt a dire qu'ils reſtent parfaitement *Neutres*.'—See alſo p. ii. c. i. and ii. Commercer ſur le même pié que quand ils ſont en Paix.

's'il

's'il ſe peut, ſi non, *que du moins la guerre ſoit bientot ter-*
'*minée.*'

Now, I would aſk the common ſenſe of any one man, lettered or unlettered, whether it is a proof of wiſhing to re-eſtabliſh peace, or of a ſincere employment of good offices, when one of the Belligerents begins to be preſſed by the other, and, by conſequence, to ſtand in need of all his military forces, at the expence of withdrawing a portion, or perhaps the whole of the ſtrength and vigour which had been allotted before to the arts of commerce; that a Power, which had hitherto ſtood by, ſhould ſtep in, and do that for the Belligerent which he was no longer able to do himſelf? To come a little more into the detail and application of this argument, let us ſuppoſe, as was the caſe with France, a heavy duty upon foreign freight had formed an almoſt fundamental law of her own commercial code; which, in times of peace, was a kind of Navigation Act, amounting to an interdiction of foreign interference; and that, of a ſudden, while engaged in war, wanting her ſailors, perhaps her merchant-ſhips, for hoſtile expeditions, at the ſame time wanting the pecuniary and other ſources of her trade, which would thus be extinguiſhed, ſhe applied to nations calling themſelves neutral, by taking off this duty, or even by bounties, to carry on this trade. Here is a proof how neceſſary this trade is to her exigencies, and how impoſſible it is to preſerve it, conſiſtently with her warfare. But where is the man of plain underſtanding, and unintereſted in the queſtion, who would not determine, that if the Neutral accepted the offer, that inſtant he interfered in the war? But Neutrals do thus interfere, nay, they arm in order to ſupport their interference. Adieu, then, to the boaſted philanthropy of the Neutral, whoſe great duty is to do all he can for the re-eſtabliſhment of peace!—Adieu to thoſe good offices which he is ſincerely to employ, in order that the injured party in the war ſhould obtain ſatisfaction! For if,

according to Hubner's supposition, they can tell which is the *partie lesée*, and, in this case, he should happen to be the stronger of the two, able, as well as endeavouring, to do himself right, the Neutral, by interposing his indirect, but not less powerful assistance in favour of the other, not only becomes a party in the cause, but on the very worst side of it!

These observations apply, very generally, to all the carrying trade; but they more particularly apply to that specific claim in the first article of the armed neutrality of 1780, to navigate freely on the coasts, and from port to port, of nations at war. In so far as the coasting-trade of a nation is more valuable and more necessary to its existence than its foreign commerce; in just so far is the interposition of Neutrals more powerful in its favour. That it is more valuable, and almost necessary to existence, it would be needless here to prove, having been already so often proved in the works of many wise men; but if proof were wanting, and the theory yet stood in need of example for support, the French themselves, triumphant and gorged with victory as they are by land, afforded one in this war, almost irresistible. We saw how soon the whole of their foreign and colonial trade was dissipated and destroyed by British victories—we saw them almost systematically yield up their colonies, and turn the whole body of their seamen into cruisers and ships of war. But the coasting trade, from port to port, was absolutely necessary, not merely to their comfort and luxury, but to the very possibility of fitting out those fleets and cruisers, without which, to a certain point of strength, they can never hurt us, were their armies ten times more numerous and more enthusiastic than they are. The efforts of Great Britain were, therefore, naturally directed against this necessary trade; and, by the painful vigilance and active efforts of that gallant set of men, the officers and sailors of the British navy, whom to honour is but to name,

the exertions of the French were crippled in their very ports. Their ſcattered and ruined convoys ſo often baffled in their endeavours to enter the ports of maritime equipment, and the conſequent delay of months and years in the exertions of an enemy otherwiſe ſo active, are advantages, not ſo brilliant, perhaps, but hardly leſs uſeful than thoſe wonderful victories which our fleets have ſo nobly and ſo uniformly achieved. They afford a proof indubitable of the neceſſity of the coaſting-trade to all naval exertion in time of war.

Now, to ſupply this very neceſſity, when a Belligerent can no longer ſupply it himſelf, is the ſtupendous claim of the Armed Neutrality! What the deciſion of a mind merely candid and juſt (for it requires not the aid of lights or learning) muſt be upon it, I leave to the common ſenſe of any one to determine. Certain it is, that if allowed, it is in vain that victories ſhall be purchaſed at the expence of rivers of blood; ſince, unleſs they amount to the *extermination* of the conquered, they muſt and will riſe again, through this moſt juſt help of neutral exertion. Yet theſe are the principles of a man, a citizen of the world, the friend of mankind,* in the very moment of laying down a rule, founded, as he ſays, in the primitive law of univerſal juſtice, that neutrality is *not to interfere in the war*, and that one of its grand duties is to do its utmoſt, by ſincere good offices, to bring about the eſtabliſhment of peace.

It is really ſurpriſing to obſerve the injuſtice into which an honeſt, but miſdirected love of juſtice will often hurry men, when the mind is under the dominion of a particular bias, or warped by the love of a favourite ſyſtem. Hubner profeſſes every where that Neutrals have a right to trade in war as they had a right to trade in peace; the unſoundneſs

* Hubner, in his Preface.

of

of which doctrine, as an universal rule, I have been endeavouring to shew. He is startled, however, by the terms of his own premises, when he comes to consider their right to a colonial trade in war, to which they had no right during peace. That trade having been generally forbiddem them, and never opened except in cases of necessity in war, a necessity occasioned by the pressure of the superior Belligerent, a gleam of the injustice alluded to comes across him, and he pauses before he allows its legality. He sees (for even he is obliged to see) that it has, to use his own terms, 'Un rapport direct et immediat à la guerre, parceque les mêmes peuples neutres ne la font jamais, et n'osent le faire en temps de paix; qu'il ne leur est ouvert qu'en temps de guerre, et *à cause de la guerre*; et qu'enfin au rétablissement de la paix ils en sont dérechef exclus.'* He is obliged to allow, therefore, that *quelque incertitude* hangs over this part of the subject; yet, without attempting to remove the uncertainty—without one syllable to reconcile the difficulty—the very next sentence asserts, 'that he sees no reason why Sovereign States which are neuter ought to refuse to themselves *so considerable an advantage as presents itself*, provided they abstain from supplying those colonies with contraband.'†

Here, in fact, is developed the whole mystery of the subject; because here, in spite of all disguise, is the true reason of the claim: 'Neutrals *cannot refuse to themselves so considerable an advantage*;' which, word it as delicately as they will, is neither more nor less than to say, that the wars of others, instead of calling for all their sincere good offices for the *redress of the injured party*, or, at least, for the re-establishment of peace, are, in truth, the harvest of Neutral

* Hub. p. i. c. iv. s. 6. † Ib. p. i. c. iv. s. 6.

Powers, by making them the carriers of the weaker party.* Whether that party is the one injured, or injuring, is no where ſtipulated; for, in the works of Hubner, or Schlegel, it ſeems indifferent which it is, *provided the Neutral is employed*; and in that caſe the Neutral cannot certainly '*refuſe to himſelf ſo conſiderable an advantage.*'

It is really revolting to obſerve this contradiction, and how little regard is thus paid to his own principles by Hubner, though it is this, perhaps unwary diſcovery, that leads him, in the ſame ſpirit, to confeſs, ſpeaking of the eſtabliſhed law, that enemy's goods ſhall be lawful prize wherefoever found: 'Que celle des parties Belligérantes, dont la marine 'marchande, et par conſéquent auſſi la marine guerriere *eſt* '*fort inferieure* a celle de ſon ennemi, n'inſiſtera jamais ſur 'la vérité de la maxime que nous combattons.'† He then goes into

* This part of the argument is put with great force and clearneſs by the Earl of Liverpool, in his Diſcourſe on Neutral Nations. He ends it with obſerving, that 'if this right were admitted, it would be the intereſt of all Commercial States to promote diſſenſions amongſt their neighbours.'

† Hub. p. i. c. iv. ſ. 5. It is curious to obſerve the complete proof, in point of experience, which this obſervation received from the Declarations of the Courts of Madrid and Verſailles, in anſwer to the Ruſſian Declaration of an Armed Neutrality. Although thoſe two Powers had been uniformly famous in Europe for the ſevereſt maritime laws againſt Neutrals, having been, perhaps, the firſt to enforce, and the laſt to relinquiſh, the maxim, not merely that enemy's property is confiſcable on board the ſhips of a friend, but alſo that other, that 'Robe d'ennemi confiſque celle d'ami;' yet they were now, for the firſt time, fully convinced of the injuſtice of their conduct. They were feelingly alive to the injuries that the Northern Courts had ſuſtained. They had diſcovered how founded in juſtice, how conſonant with true moderation, how advantageous even to Belligerents, were theſe principles, for the defence of which they themſelves were then actually at war! It is ſcarce neceſſary to point out, however, the wonderful changes which twenty years produce. Theſe principles, here ſo plainly aſſented to, were all ſwept away in the whirlwind of the French Revolution; and the Directory diſcovered, in 1798, that Belligerents are not only in the right to oppoſe them, but, by their decree, confiſcate all veſſels, not merely which ſhall carry enemy's property, but enemy's manufacture. Bonaparte again diſcovers

into a diſquiſition, to prove that their acquieſcence is the more juſt, becauſe their profit in their commerce with Neutrals is much diminiſhed in time of war, owing, as he expreſsly ſtates, to the ruin of their own trade, the greater conſequent neceſſity for the interpoſition of Neutrals, the greater demand which the latter will therefore make as the price of their aſſiſtance, and the greater charges which they are really obliged to incur, in conſequence of the dangers they run in the difficult ſervice they have undertaken. With due ſubmiſſion to thoſe who approve this writer, this reaſoning is the ſtrongeſt that can be adduced againſt his own poſitions; for the higher price that is paid for neutral interpoſition, the ſtronger is the proof of the imperiouſneſs of that neceſſity to which the weaker Belligerent is reduced. The more palpable, therefore, the evidence that the Neutral is interpoſing againſt the honourable and legal exertions of the ſuperior Belligerent. It admits alſo, in a manner too undiſguiſed to be miſunderſtood, the real and ſole object of the weaker Belligerent, and of the Neutral carrier, in their endeavours to beat down the lawful and juſt oppoſition ſet up againſt their moſt unlawful conſpiracy; namely, that the one may be able to fight the longer; and that the other may, *without danger*, put money into his pocket, for ſupplying him with the means of fighting. This would inevitably be the conſequence of agreeing to the principle contended for, as a point of univerſal law; and whenever that point is carried, there ſcarce ever will be any end, except the moſt

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diſcovers that Kings, in this inſtance at leaſt, were more juſt than Directors, and announces that the North, being about to arm in defence of the liberty of Navigation 'peut compter ſur la France!' Contraſt this with the ſteady, conſiſtent, and dignified conduct of Great Britain, laying down the principle, on the ſide of Belligerents, as founded in real and natural right, and, under whatſoever preſſure, never departing from it thus laid down.

ſhock-

ing to a maritime war where the forces are nearly equal. Since, although, one party may be weakened in the ſhock, his loſs will be ſupplied, and his powers renovated, by the '*good offices*' of Neutrals, which, if perchance, he ſhould in his turn acquire the ſuperiority, would immediately be transferred to his antagoniſt, (as in the true neutral ſpirit it ought to be); and ſo on eternally, till one or other, or both, periſh altogether in the conteſt.

The ſupporters of this claim imagine, that it is not liable to ſo warm an inculpation, becauſe the Neutral is, or ought be, ready to ſerve both parties with the ſame readineſs and zeal. According to all the theories, it is laid down in due order, that neutrality is thrown off, by ſhewing any favour to one which is refuſed to the other; and this readineſs to aſſiſt the ſuperior when he ſhall want aſſiſtance, is thought to bring all round again. But upon this it muſt be remarked, that complaint is not made ſo much for a preference ſhewn, as an injury done; that at the time of the act complained of, the aſſiſtance is not wanted by the ſuperior; and although it muſt be owned, in all ſchemes of morality, that men ſhould judge in every other perſon's caſe, as if that caſe was one day to become their own; yet, even in thoſe caſes, judgment is ſuppoſed to be given according to general rules of action, applicable to all the world, and for the advantage of all the world, not with a partial view to our own particular intereſt. If, then, it is for the benefit of all the world, that when two nations appeal to the ſword, and the ſurrounding nations have declared that they will take no part, thoſe nations ſhould be loyal to their declarations, and aſſiſt neither party; it is not leſs a falſification of their word, that they will aſſiſt both. If this were ſo, it would hold equally good, if the indirect aſſiſtance complained of was extended into a more direct interpoſition, in the caſe, for inſtance, of actual military aid; and then we ſhould arrive at

this ſingular conſequence in the reaſoning, that a nation was perfectly neutral, becauſe it ſent an army of its own citizens to cut one another's throats, on each ſide of the queſtion.

But I own, it is to me matter of aſtoniſhment, that writers ſhould ſtop here, and not carry the principle farther, ſo as to affect articles of acknowledged contraband. If this right of navigation is really ſo ſacred, and ſo extenſive, that I am quietly to ſee my enemy's trade, (that fund from which a maritime enemy ſtrengthens the ſinews of maritime war,) carried on under my eyes, paſs, as it were, through my very hands, be lodged, perhaps, for a time within my very ports (for who knows that the right is not to extend to Neutrals coming for refreſhment or repairs within the dominions of the Belligerent?) I ſee no reaſon why it ſhould not extend to contraband, provided there is no treaty. If the claim is founded upon ſo ſacred a privilege of commerce, that no circumſtances can modify or curtail it; if it is founded upon the abſoluteneſs of the freedom of the ſea, and the entire want of dominion, and conſequent juriſdiction upon the ocean, the ſame foundation applies equally to contraband of war. If I cannot take a bale of enemy's cotton from a neutral ſhip, merely becauſe ſhe has a right to traverſe the ſea where I have no authority; as little authority have I to ſtop and ſearch, or ſeize her, becauſe ſhe is loaded with cannon, though avowedly for the uſe of my enemy. Yet Hubner agrees that contraband of war is always ſeizable, although not the ſubject of any treaty with the captor. Either, then, the reaſon for the principle in queſtion is falſe, or contraband of war muſt paſs free; but the latter does not paſs free, even according to him: the reaſon, therefore, of his principle is falſe.

That I do not overſtep the bounds of fair reaſoning, in carrying thus [illegible] the principle of Schlegel's maſter, will at leaſt be not denied by Schlegel himſelf; for the praiſe of conſiſtency muſt certainly be afforded him, who ſays in terms, that contraband, 'quoique fondée ſur le droit des gens *conven-*

'*tionel* actuellement en force, n'eſt pourtant pas conformé 'au droit des gens naturel.'* By *conventionel*, he every where means founded on treaty; and as I ſhall, perhaps, preſently have occaſion to ſhew, both Schlegel and Hubner muſt have moſt inaccurate ideas of a law binding on all nations, if they identify it with a law binding upon thoſe only who have made treaties. Be this as it may, the glory of overturning every received notion upon the ſubject moſt certainly belongs to Schlegel. In this paſſage, the maſk is fairly thrown off, and it is roundly and boldly aſſerted, that unleſs nations have had the precaution to ſtipulate by treaty againſt dealing in contraband, there is nothing in the law of their duty to prevent them.

The ſame inviolable right of commerce, which no Belligerent can by the Law of Nature have power to control, will extend alſo to the power of entering a blockaded port, which even the articles of the Armed Neutrality, and the viſionaries that defend them, hold to be unlawful. But why unlawful, ſince the Law of Nature permits a Neutral to viſit the Belligerent when he pleaſes? Above all, it encourages and enjoins commerce, and they ought not *refuſe to themſelves ſo conſiderable an advantage as they would derive from ſupplying a blockaded port with neceſſaries!* Here, then, is another inſtance of conflicting rights, which never can be enjoyed by both claimants together. The beſiegers have a right to attack and block up a hoſtile garriſon; they hope to make it bend to the force of their aſſaults, or the vigilance of their blockade. They therefore draw lines of circumvallation by land, and guard with ſtrictneſs the mouth of the harbour, all which they have a right to do. But a Neutral

* Exam. Im. 68, 126. Vattel allows, that if a neutral nation trades in arms and ammunition, ſhip-timber, &c. 'it may continue that trade with both the Belligerents; but he confines this expreſsly to the caſe, where 'mon ennemi va acheter lui même dans un pays 'neutre.' D. des G. iii. ſ. 110, 111.

appears with his right alſo; he is in friendſhip with both, he is not going to man the batteries of the beſieged, or to carry ſtores of war to their exhauſted magazines; he is ſimply going to trade with them in innocent articles, *proviſions* for example, or to take within *the neutral dominion and protection of his ſhip* all the moſt valuable articles of the place. Why may he not do ſo, having the right to traverſe the ſea, and at the ſame time preſerve his neutral relations, and more eſpecially having a right, had he remained at home, to receive within the protection of his territory any part of the treaſure of his belligerent friend? It has been anſwered, becauſe this is interpoſing directly in the war; becauſe the place being fully ſurrounded, there is no hope of eſcaping to the beſieged; they are, as it were, in the ſituation of a conquered party; the prey is half killed in fair action: not only, therefore, no aſſiſtance ſhall be given, but the capability of giving aſſiſtance ſhall not even be attempted. But theſe propoſitions, though it is impoſſible to withhold our aſſent from them upon other grounds, I own, I do not ſee the force of, upon the principles we have been examining. I am ſincere in ſaying, that if thoſe principles are juſt, to the extent claimed by the Neutral, I cannot ſee what law it is that is ſo forcible upon the minds of the whole world as to make them agree, even in the articles of the Armed Neutrality itſelf, that a Neutral ſhall not attempt to elude a blockade.

Theſe obſervations apply alſo to breaches of an embargo, which all agree, even to the Emperor Paul, may be legally ordered, and when ordered, can never be broken without fault. It was, no doubt, his conviction of the ſacredneſs of this right of the Belligerent which made him give orders for the Engliſh ſhips, that endeavoured to break it at Riga, to be burnt by way of puniſhment. Here eminently, therefore, is an inſtance where the champions of Neutrality themſelves confeſs that there are rights belonging to one nation

which may be disturbed, and indeed annihilated, by the superior rights of the other. Why they should be allowed in these instances of contraband, breach of blockade, and of embargo, and not extended to the whole carrying the trade of enemies, I am seriously at a loss to hazard a conjecture.

There is yet another instance of the interposition of Belligerents with Neutrals, too illustrative of the subject to be passed over here. All mankind, except Schlegel, have hitherto consulted their common sense, and supposed, that the subjects of a state at war are really at war also, and therefore liable to be attacked in their property and ships. The experience of the world, since the world began, has in consequence permitted Belligerents to make prize of the private ships of their enemy. The justice, however, of the world, whatever was thought of the matter formerly, has for a long time determined, that if the goods of a friend are found on board, that circumstance alone shall not condemn them, but that they shall be fairly and honestly restored. The restoration, however, cannot, in the nature of things, be effected without subjecting the party to considerable inconvenience. The chances of being damaged or spoiled, while frequently unshipped; of perishing, if of a perishable nature, on shore; and the certainty of delay by the interruption of their voyage, occasioning manifest loss and disappointment to the owners, are the almost inevitable consequences of this legal capture, even upon the most immediate and faithful restoration. But who is to suffer, or who is to blame for this loss? The Captor exercising the just rights of war? certainly not; but the unfortunate Neutral, who, with his eyes open, entrusted his fortunes to the protection of a party, who, he knew, was liable to be deprived of the means of protection. We see, then, how visionary, partaking of little less than the original Jacobinical madness, are all schemes of right and uty, not adapted to the actual nature of man. We see that it is not true, as has been supposed by this well meaning professor, that Belligerents have only

rights to exercise with respect to Belligerents; none with respect to Neutrals;* they have, in this very instance, an absolute right to do what may occasion, as we see, very considerable loss and mortification to Neutrals, yet are wholly without blame and without responsibility, the misfortune being founded, as Vattel has before well observed,† in the nature of things, and inevitable necessity.

But another argument for the principle now meets us, more ingenious in its construction, if not more convincing in its effect; and it is gravely brought forward too by the man who is to review a judgment of Sir William Scott. He borrowed it from Hubner,‡ who advanced it in the war of fifty-six; and he borrowed it from Michel, who advanced it in the war of forty-five;§ from what sophist it was borrowed by the latter, it is of little consequence to enquire or to know.

It is clear, says their argument, by the allowance of Belligerents themselves, that the neutral *territory* can never be attacked, visited, or searched, without a violation of neutrality. All enemy's property, therefore, which is in harbour, or on shore, even though under the eyes of the other Belligerents, is safe, because inviolable without the overthrow of law. Now the ships of a neutral state belong to the sovereign or the individual who equips them, and the ports from which they sail. This is clear from the flag they bear, and from their being always amenable to the laws of their country, in whatsoever part of the sea they may be. For, if it were otherwise, their crews would actually return to a state of nature, might commit all manner of crimes without any control of magistracy, and every vessel would, form so

* Schlegel, 53, 54, 55.
† D. des G. l. iii. c. iii.
‡ Hubn. T. i. 211, 212.
§ Exposit. des Mot. &c. du Roi de Prusse.

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many independent republics, and be endowed with the rights of peace and war. But as this would be too abſurd to be admitted, all muſt acknowledge, that neutral veſſels upon the ſea are within the ſovereignty of the neutral ſtate; and, conſequently, the principle, that free ſhips make free goods, is not arbitrary, but is derived from the nature of things and the univerſal law of nations.

This wonderful diſcovery, if it means any thing, is introduced in order to found upon it a propoſition, which would indeed be wonderful if admitted, namely, that becauſe a Swediſh ſhip belongs to Sweden, (for the diſcovery is nothing more,) though ſwimming upon the high ſeas, though coaſting from port to port of an enemy's country, though paſſing from colony to colony, and from the colonies to the mother country, though employed, in fact, in the domeſtic ſervice of the enemy, perhaps half manned by him, certainly tranſporting and exchanging his cargoes for him, yet ſhe in reality is not a ſhip all this time, but Sweden herſelf: at leaſt, in all her rights and privileges to give protection, ſhe is preciſely and identically the ſame as ſo much Swediſh territory.

It requires little to refute this viſionary ſophiſm. If gravely relied upon by the author who brought it forward, he ſurely does not advert to the true nature of dominion, which is ſimply neither more nor leſs, than a right which a people have to do any act, of whatſoever nature, within certain diſtricts, in conſequence of the abſolute power over thoſe diſtricts which they poſſeſs. Sweden is thus under the *dominion* of its inhabitants. That hardy and high ſpirited race has always vindicated its independence; but could Sweden float like her ſhips through the ſea, or wander, like hordes of Tartars or Arabians, through deſerts which no body claimed, and ſhould ſhe be expoſed in her progreſs to encounters with other nations that were Belligerents,

rents; her ſovereign inviolability might be attacked by others, every moment that ſhe uſed her locomotive power for the purpoſe of annoying them. Conſequently, if in her progreſs ſhe adopted, *or had originally conceived*,* the deſign of doing what was hoſtile to thoſe under whoſe dominion ſhe ſhould happen to come, or whom ſhe ſhould happen to meet in places where no dominion was paramount to both, the rights of examination and judgment according to law would inſtantly accrue.

The true reaſon, therefore, is founded, not in a pretended right of dominion over the ſea, which is, even in theſe times either wilfully or ignorantly ſuppoſed; not in any diſtinction which is made between the Swediſh ſovereignty within the planks of its ſhips and the ſhores of its territory, but in the ſimple circumſtance, that, from their power of moving over the face of the globe, the goods of enemies in neutral ſhips are called forth into action, may be uſed directly to the annoyance of the other Belligerent, and at very leaſt are working, while in the courſe of trade, the direct advantage of thoſe who ſhip them. In this point of view, therefore, it matters little whether it be a ſhip or a waggon, and the reaſoning of Schlegel upon the difference between maritime and continental war is, like moſt of his other ſophiſtries, eaſy to be examined, and never ſtanding the touch of examination. We ſtate, therefore, in this reaſoning, nothing but a plain, known, and received maxim, that no nation, profeſſing neutrality, ſhall aſſiſt either Belligerent in the war, whether endowed with ſtationary or locomotive power. The former will make not the leaſt difference, either in the principle, or in the rights founded upon it; for, if the Sovereign of a ſtate that poſſeſſed not a ſhip in the waters, aided, com-

* It is to be obſerved, that the Swediſh convoy ſet ſail from the Baltic with inſtructions to reſiſt the exerciſe of the right of ſearch, if attempted.

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forted, and encouraged one Belligerent againſt the other, his neutrality would be inſtantly broken, and the right of complaint and of puniſhment would as forcibly accrue, as if his fleets had engroſſed the carrying trade of the world. For example, if he ſuffered him *excluſively* to make levies in his territory, never having done it before, and expreſsly to be employed againſt the other party;* if he furniſhed him with corn, *never having previouſly* lent it him,† and expreſſly to be employed for the equipment of an expedition; if he allowed him to march an army through his country, expreſsly to invade the other *more commodiouſly*; if he lent him a ſtrong place on his frontiers, for the purpoſes of alternate retreat or annoyance,‡ or ſold him arms and ammunition, or equipped him again with the means of offence, of which the fortune of war had diveſted him; in all theſe caſes, the Belligerent injured might prevent him by every means in his power, as much as he might prevent the actual attempt at aſſiſtance upon the ſea, and even, if unredreſſed, to the denunciation of war. Thus alſo, though a maritime Neutral power ſhould ſtrictly abſtain from carrying the trade of a Belligerent, or ſupplying him with contraband; yet, if he opened his ports to his privateers *for the purpoſes of hoſtile equipment*; if he gave him ſhelter for his prizes,§ or lent him his courts, or ſuffered him to erect his own, for the purpoſe of condemn-

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* Vattel, l. iii. c. 110. † Ib. ‡ Ib.

§ The governors and miniſters of the United States, during this war, have, in many inſtances, exhibited admirably clear proofs of knowledge in the laws of neutrality, and of ſpirit to enforce them in their conteſts with the *philoſophers* of France: not only refuting their attempts to change the laws in this inſtance, by inſiſting upon the liberty of ſeizing Belligerent property within the American juriſdiction; but enforcing that reſtitution by reſtoring prizes thus made. See the long note from Adet to the American Secretary of State, 5 Debrett's State Papers, 263 to 294; and the Secretary Pickering's *moſt* able anſwer, 6 Deb. 281 to 339.

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ing them;* in all theſe caſes, alſo, there would be a breach of neutrality, and cauſe for war.

Here then is the true principle: the actual aſſiſtance given to a Belligerent, whether ſtationary or tranſitory. There is, however, a moſt material diſtinction between them, which, far from depriving the injured Belligerent of his right of prevention, calls for it in a ten-fold degree; becauſe the injury is attended with ten-fold aggravation. When pretended Neutrals lend their ſhips to the trade of the enemy; the aſſiſtance, from having been paſſive, as in the other examples, becomes inſtantly active: it not only affords aid, but carries the ſupply; and the force and power of the miſchief is thus felt in augmented proportion. The dominions of a maritime Belligerent being, beſides, ſcattered over the face of the whole world, new difficulties ariſe to him in the courſe of war. The variety of his colonies, iſlands, fiſheries, and factories, require a minute diverſion of his protection, which, for the moſt part, embarraſſes him. The locomotive aſſiſtance of his neutral friend does him, therefore, here the moſt active and eſſential ſervice, and marks the partiality of it in exact proportion as it is active and eſſential. Suppoſing, then, for a moment, the dominion within the ſides of a ſhip to be the ſame as the dominion of the country which equips it, the complaint here is not ſo much that ſhe affords protection, as that ſhe actually carries the property protected; an injury which it is phyſically impoſſible for protection on ſhore to commit. In the latter caſe, while the property lies harmleſs in the ſtore, the harmleſs rights of friendſhip are chearfully allowed; in the former, actual miſchief to another is ſo interwoven with thoſe rights, that Neutrality is broken, and impartiality at an end.

* As was attempted by the French in the commencement of this war, in endeavouring to ſet up a Conſulate Tribunal, with Admiralty powers, in Denmark and other Neutral States.

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Theſe, then, are the ſimple and plain principles upon which we proceed; and they will alſo eaſily afford an anſwer to an obſervation which is made with no ſmall confidence by the Daniſh Profeſſor, that neutral rights *are more reſpected* in a continental than a maritime war. As a proof of this, he ſays, it is ever held unlawful to plunder individuals who do not bear arms, although ſubjects of the enemy himſelf; and that Belligerents permit Neutrals to paſs through their countries to the great fairs that are held upon the Continent at ſtated times. *

Now, in the firſt place, the obſervations are falſe in point of fact; but, if true, they will not bear the concluſions built upon them. Did the Profeſſor never hear of the ſack and pillage of towns, and the murder of innocent perſons, in a ſtorm? Did he never hear of the ravage of the Palatinate, where hundreds of harmleſs cottages were laid ſmoaking in ruins by the moſt accompliſhed and moſt humane of his time, reduced, by the inferiority of his numbers, to waſte a whole country, in order to prevent the irruption of the enemy? According to the accounts of hiſtorians, in the act of blaming him, all the evil that he did, appeared to be neceſſary, and, if he ſacrificed the principles of humanity, it was to the duties of a General and the rules of war.† In later times, has the Profeſſor never heard of inſtructions from a French Miniſter, in the ſame ſpirit, to make a downright deſert in Weſtphalia, as a mere plan of defence?‡ At leaſt, did he never hear of ſuch things

* Examen. Impar. 1, 2, 46.

† Voltaire, Siec. de Louis XIV.---Mod. Un. Hiſt. 21. 392.

‡ See the Inſtructions from Belleiſle to Contades, taken amongſt the latter's papers after the battle of Minden. Theſe are ſome of the extracts.——'After obſerving the formalities due to 'the Magiſtrates of Cologne, you muſt ſeize on their great artil-'lery by force, telling them that you do ſo for their own de-'fence.' 'You muſt deſtroy every thing which you cannot 'conſume, ſo as to make a downright deſert of Weſtphalia.'--'Though the Prince of Waldeck is outwardly neutral, he is very ill

things as contributions from States that had never offended; ſuch, in this very war, as Frankfort and Leghorn, where the failure in ſupplying the demand brings down inſtant puniſhment by fire and ſword? One would think that he would have certainly relinquiſhed his remark, had he ever reflected on theſe or other ſeverities; the frequent bombardments of the moſt beautiful cities, crowded with innocent and unarmed inhabitants; ſuch deſolation as was practiſed at Dreſden, in the ſeven years war, where whole ſuburbs were fired by the hot balls of the town itſelf, and where the lives of hundreds, and property of thouſands, were ſacrificed to the cruel neceſſity of the terrible ſtate of war.* Could we ſtop the current of the argument for a few moments, and examine the tranſactions of continental campaigns, what immenſity of proportion would the injuries done to

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' ill diſpoſed, and deſerves very little favour. You ought, there-
' fore, to make no ſcruple of taking all you find in that territory:
' but that muſt be done in an orderly manner, giving receipts, &c.
' &c Zippe and Paderborn are the moſt plentiful; *therefore they*
' *muſt be eaten to the roots.*'---The French defended this upon the legality of waſting a country, in order to cut off ſubſiſtence to the enemy. Ann. Reg. 1759.——Again: obſerve the orders of Broglio, when conqueror in Hanover, to the civil and *unarmed* inhabitants. 'Whereas many civil officers and principal inhabitants
' of Brunſwick and Hanover have withdrawn themſelves, &c.
' they are ordered to remain in their houſes, with their cattle,
' *upon pain of having their houſes pillaged, and levelled with the*
' *ground, and themſelves puniſhed according to the exigency of the*
' *caſe.*' Ann. Reg. 1761. Severe as all this appears, it is, perhaps, not indefenſible by the laws of war. But even if they are not, as Schlegel obſerves upon the *fact* of ſuperior continental regularity, they are proofs in full of the eaſy raſhneſs with which a viſionary aſſertion is made.

* See the Memorial of the King of Poland, publiſhed at Vienna on the raiſing the ſiege of Dreſden. Smollet's Hiſt. of Eng. 15. 49; and his other Memorial preſented by the Saxon Miniſter to the Diet of the Empire, 24th Nov. 1758. Its force was ſomewhat diminiſhed as to *facts* by the anſwer of the Pruſſian Miniſter; but whichſoever is true, enough is left for the ſupport of the argument; the conteſt being only as to the quantum of the deſtruction. See Ann. Regiſter, 1758.

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unarmed inhabitants, both of Belligerent and even Neutral States, bear to the few comparative ſeizures made upon the ſeas! Nor ſhould we draw the examples from ſavage or ignorant Commanders, but from the deliberate determinations of a *philoſophic* King of Pruſſia, a good-natured Turenne, and even of the almoſt perfect Guſtavus Adolphus himſelf.

The whole of Schlegel's errors proceed, as it appears to me, from a want, I cannot ſay of a right underſtanding, but of a right uſe of fixed and clear principles. Let him only once bear in mind that firſt and comprehenſive rule, embracing almoſt all the laws of war, both by ſea and by land, '*that we may do whatever miſchief is not unneceſſary*;' and all, or nearly all the ſeverities that have been touched upon, both by ſea and by land, may be perfectly reconciled.

And here I might cloſe the diſcuſſion of the principle, if the opinion I have embraced depended for ſupport, or could ever obtain the authority of law, on the private ſpeculation of an individual in his cloſet. But as this cannot be, even in a matter that depends eminently upon the determinations of reaſon and general equity; I proceed to ſhew that this is not a mere private ſpeculation, unfounded in experience, but drawn from the authority of thoſe wiſe and enlightened men by whoſe virtue and ſcience the governors of the world have generally been directed, and muſt always be influenced.

SECOND SECTION.

THE REASONING FROM AUTHORITY AND CUSTOM.

IT is remarkable, that from the time when the Law of Nations began to exiſt as a ſcience, ſince which, if we take it from the publication of the *Conſolato del Mare*, a period of full five hundred years has been revolving, the ſtream of authorities, until the middle of the laſt century, has been againſt the principles of the Armed Neutrality. In that latter time, the proviſions of the *Conſolato* were boldly called in queſtion, and, in the firſt inſtance that I know of, an attempt was made to eſtabliſh the contrary. I allude to the famous *Expoſition del Motifs* of the King of Pruſſia, addreſſed to the Miniſters of George II; famous, however, more for having called forth the well-reaſoned piece of law which formed its anſwer, than for any merit of its own, for ſoundneſs of principle, or cogency of deduction. Until the year 1752, when this diplomatic piece appeared, the law, as I have reaſoned it, ſeems to have been admitted. The claim had, indeed, often been ſtarted by particular countries; but it was ſtarted without ſucceſs even by De Witt; and whenever it was granted, it was granted as a boon, obtained by the ſtipulations of particular treaty. No one authority, that I can find, before this, had ever laid claim to it as a natural right; and even Schlegel allows that it was then, for the firſt time, that the rights of Neutrals were completely diſcuſſed. 'Il (roi de Pruſſe) fit imprimer une 'defence publique, dans laquelle les Droits du Pavillon 'neutre furent *pour la premiere fois completement diſcutés.**

* Schleg. 5.

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We cannot help, therefore, pauſing in this place, to obſerve the artful manner in which he has treated the hiſtory of the claim: for, in the outſet of his work, he would have the world think that, in the beginning of the ſixteenth century, the *Conſolato* was ſet aſide (in form, I ſuppoſe, by a kind of general convention), and that other laws, more conſonant, according to him, with neutral rights, were eſtabliſhed in its place. Certain it is, he leaves it to be ſuppoſed, that it was about that time that the merchants obtained the abrogation of the old law, in conſequence of which it was determined, that a Neutral veſſel ſhould no longer be ſtopped on account of her having enemy's property on board.*

That ſuch an aſſertion, if he meant it, is moſt erroneous, we ſhall ſoon have occaſion to prove; but be it true or falſe, the confeſſion in the paſſage above cited is totally repugnant to it; and thus from his own authority is demonſtrated his own inconſiſtency.

In tracing the hiſtory of authorities, let us come, then, to the conſideration of the famous *Conſolato*, that venerable pile of maritime and commercial law, whoſe origin is of ſuch remote antiquity, and rooted ſo deeply in the annals of time, that

* 'Dans les 14me & 15me ſiécles, preſque tous les traités furent 'faits d'après ce principe. Mais comme il en réſultoit mille chicanes 'lorſqu'il agiſſoit de decider de la propriété des cargaiſons, fur 'tout depuis que les marchands eurent abandonné l'ancienne cou 'tume de ſuivre leurs marchandiſes ſur les navires, & comme de 'lors la cargaiſon ſe trouvoit ſouvent appartenir à diverſes propriétaires, les négocians qui faiſoient le commerce maritime deſirérent 'une autre diſpoſition générale qui tranchât mieux, à les garantir des 'mauvais traitemens des corſaires. Il fut en conſéquence déterminé 'qu'on n'auroit plus égard au propriétaire de la cargaiſon, mais à 'celui du vaiſſeau;—qu'un Vaiſſeau neutre ne pourroit plus être 'arrêté parce qu'il auroit à bord des marchandiſes ennemies, & 'encore moins parce qu'il ſeroit deſtiné pour quelque port ennemi, 'ſauf toute fois le cas où il ſeroit chargé de ce qu'on appelle *contrebande de guerre*.

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no one can tell with certainty at what period it was compoſed.* Be this as it may, it was the received rule of conduct which governed the greateſt maritime nations; was the oracle of their tribunals, and decided queſtions of prize, whether relating to the property of enemies or neutrals, or abandoned to fortune without any owner. This ancient compilation contains the conſtitutions of the Greek and German Emperors; of the Kings of France, Syria, and Cyprus; of Minorca and Majorca; of the Venetians and Genoeſe. Greater authorities can ſcarcely be found, and need not be required. The German Emperor at that time reigned paramount in the Netherlands, and on the ſouthern ſhores of the Baltic; and Conſtantinople and the two Republics were, as is well known, the arbiters of trade and the lords of the ſea. Theſe conſtitutions, therefore, governed by far the greater and the moſt important parts of the commercial world.

The cclxxiii. chapter of this compilation contains the following proviſions:

'If an armed ſhip, or cruiſer, meets with a merchant veſ-'ſel belonging to an enemy, and carrying a cargo, the pro-'perty of an enemy, common ſenſe will ſufficiently point out

* I cannot do better on this ſubject than tranſcribe a note of Dr. Robinſon, prefixed to his tranſlation of ſome paſſages in the Conſolato:—

'With reſpect to its antiquity, the reader is referred to the 'table prefixed to the Italian editions; in which it is ſpecifically aſ-'ſerted to have been received at Rome in the year 1075; and 'at various places, at various periods, through the 11th, 12th, and '13th centuries. But let him conſult alſo Giannone's Iſt. di Napoli, 'lib. xi. chap. 6. in which, according to ſome opinions, this com-'pilation is ſuppoſed not to have been made till the time of 'Louis IX. of France, towards the middle of the 13th century. 'It is, however, generally allowed to have been compoſed from 'the Amalphitan Table; and as that is ſuppoſed to have ex-'iſted as a body of ſea laws, of great and extenſive authority in 'the Mediterranean, from the cloſe of the 11th century, there 'may, perhaps, be no great variation in the ſubſtance of theſe two 'accounts.'

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what is to be done: it is, therefore, unneceſſary to lay down any rules for ſuch a caſe.

'*If the captured veſſel is neutral property, and the cargo the property of enemies, the captor may compel the merchant veſſel to carry the enemy's cargo to a place of ſafety, where the prize may be ſecure from all danger of re-capture; paying to the veſſel the whole freight which ſhe would have earned at her delivering port;* and this freight ſhall be aſcertained by the ſhip's papers; or, in default of neceſſary documents, the oath of the maſter ſhall be received as to the amount of the freight.*

'Moreover, if the captor is in a place of ſafety, where he may be ſecure of his prize, yet is deſirous to have the cargo carried to ſome other port, *the neutral veſſel is bound to carry it thither:* but for this ſervice there ought to be a compenſation agreed upon between them; or, in default of any ſpecial agreement, the merchant veſſel ſhall receive for that ſervice the ordinary freight that any other veſſel would have earned for ſuch a voyage, or even more: and this is to be underſtood of a ſhip that has arrived in the place where the captor may ſecure his prize; that is to ſay, in the port of a friend; and going on an ulterior voyage to that port to which the captor wiſhes her to carry the cargo which he has taken.

'If it ſhall happen that the maſter of the captured veſſel, or any of the crew, ſhall claim any part of the cargo as their own, they ought not to be believed on their ſimple word, but the ſhip's papers or invoice ſhall be inſpected; and, in defect of ſuch papers, the maſter and his mariners ſhall be put to their oaths; and if, on their oaths, they claim the property as their own, the captor ſhall reſtore it to them;

* Bynkerſhoek, nearer to us by ſix hundred years than the *Conſolato*, while approving the former part of this article, rejects the right to freight, becauſe it has not been earned.—*Queſt. Jur. Pub.* cap. xiv.

regard being paid, at the ſame time, to the credit of thoſe who ſwear and make the claim.

'If the maſter of the captured veſſel ſhall refuſe to carry the cargo, being enemy's property, to ſome ſuch place of ſafety, at the command of the captor, the captor may ſink the veſſel, if he thinks fit, without control from any power or authority whatever; taking care to preſerve the lives of thoſe who are in her. This muſt be underſtood, however, of a caſe where the whole cargo, or, at leaſt, the greater part of it, is enemy's property.

'If the ſhip ſhould belong to the enemy, the cargo being, either in the whole or in part, neutral property, ſome reaſonable agreement ſhould be entered into on account of the ſhip, now become lawful prize, between the captor and the merchants owning the cargo.

'If the merchants refuſe to enter into ſuch an agreement, the captor may ſend the veſſel home to the country whoſe commiſſion he bears; and in that caſe the merchants ſhall pay the freight which they were to have paid at the delivering port. And if any damage is occaſioned by this proceeding, the captor is not bound to make compenſation; becauſe the merchants had refuſed to treat reſpecting the ſhip, after it had become lawful prize; and for this farther reaſon alſo, that the ſhip is frequently of more value than the cargo ſhe carries. If, on the other hand, the merchants are willing to come to a reaſonable agreement, and the captor, from arrogance, or other wrong motives, refuſes to agree, and forcibly ſends the cargo away, the merchants are not bound to pay the whole, nor any part of the freight; and, beſides, the captor ſhall make compenſation for any damage he may occaſion to them.

'If the capture ſhould be made in a place where the merchants have it not in their power to make good their agreement, but are, nevertheleſs, men of repute, and worthy to be truſted, the captor ſhall not ſend away the veſſel, without being

being liable to the damage; but if the merchants are not men of known credit, and cannot make good their ſtipulated payment, he may then act as it is above directed.'*

Such expreſsly are the proviſions of the *Conſolato del Mare*, ſome of which have ſtood the teſt of ages, through all the wonderful alterations in manners and juriſprudence which Europe has ſeen; an abundant proof of their deep foundation in the trueſt principles of reaſon and juſtice. If proof, however, were wanting, I ſeek no other, than to find thoſe at leaſt of them, that form our immediate ſubject, approved, and adopted word for word, in the writings of three men, all of them foreigners, of countries whoſe intereſt it eminently is to ſupport this Neutral claim; but who, if it was not, muſt for ever ſtand at the head of the whole world's college of civilians, for experience, learning, and good ſenſe. The writers I mean, are no leſs than Grotius, Bynkerſhoek, and Heineccius. And firſt of the wiſe, and liberal Grotius.

He at leaſt will not be ſuſpected of being a partial or intereſted advocate in our favour, even if the whole tenor and plan of his book did not ſhew that it was written for the world. During the firſt part of his life, his country was Dutch, his intereſts were Dutch; when driven from his home, his aſylum was France; and when adopted into another State, that State was Sweden. How well, and how zealouſly he was diſpoſed to aſſert the privileges of the latter againſt this very England, with whom ſhe now prepares to quarrel; his hot and eager conteſt for precedency with the Engliſh Ambaſſadors, ſufficiently demonſtrates.† But he was actually, beſides, the great champion for the freedom of navigation; being the firſt to pull down the dominion of the ſea, (alſo againſt the pretenſions of England;) and he lived

* This tranſlation is by Dr. Robinſon.
† Burigny Vie de Grot.

in a time, when his countrymen were raiſing to its height the ſource of their wealth, by rendering their State the emporium of trade, and becoming the carriers of the reſt of the world.

From ſuch a man little could be expected in favour of any tyrannical pretenſions; ſtill leſs of pretenſions that clog the freedom of navigation; and more particularly of Dutch or Swediſh navigation. Yet, as has been ſaid, he adopts the rule of the *Conſolato*, that enemy's property ſhall not be covered by Neutral veſſels; and he, as well as Heineccius, adopts it from a chapter in which, they expreſsly ſtate, that controverſies of this ſort are handled.* Yet, ſtrange to ſay, Hubner, from what cauſe I know not, aſſerts, in terms in his preface, after ſtating that the *Conſolato* relates, amongſt other things, to capture, and recapture, 'ni les unes ni les autres ne ſauront être *d'aucun ſecours* a ceux 'qui voudroient diſcuter les droits des nations Belligérantes 'au ſujet de la navigation des peuples neutres'.† Whether Hubner had carried his reſearch, or his zeal, ſo high as to deſpiſe the aſſiſtance of this compilation, it is not for me to enquire; but Grotius at leaſt paid it that deference, which

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* Grot. de Jur. Bel. iii. 1, 5 notis. 'Ubi ex inſtituto tractantur hujus generis controverſiæ' Heinec. de Nav. ob Vec. Merc. Vet. Com. cap. viii.

† Other readers will, perhaps, be more diſpoſed to eſteem it a valuable, but hidden treaſure, with the very reſpectable names of Cara-Regis, Vana, and Emerigon, than to join with ſpeculative theoriſts in terms of diſreſpect, calling to mind the words of Mr. Emerigon who ſays, of this work, and of Hubner's criticiſm on it: 'Cet auteur, ayant trouvé dans le chapitre 273, *des déciſions contraires à ſon ſyſtême*, à été de mauvaiſe humeur, contre l'ouvrage 'entier; mais ſi l'eut examiné avec quelque ſoin, il ſe ſeroit convaincu, que les déciſions, que le conſulat renferme, ſont fondées 'ſur le droit de gens. Voilà pourquoi elles *réunirent les ſuffrages* 'des nations; elles ont fourni une ample matiere, aux rédacteurs 'de l'ordonnance de 1681; et malgré l'ecorce Gothique que les 'enveloppe quelquefois on y admire l'eſprit de juſtice, et d'equité 'que les à dictées.'

Dr. Robinſon's tranſlat. of the Conſolato.

as an authentic monument of what was thought and practiſed by our anceſtors, it muſt generally command, and always deſerve.

Let us now then examine the opinions of Grotius himſelf; premiſing, however, that he is not treating of maritime matters in particular, neither does he confine himſelf to the land; but that it is *principles* which he lays down; and that he ſpeaks *generally* of the duties of Neutrals and the rights of Belligerents. 'A queſtion,' ſays he, 'often ariſes upon 'what is lawful', with reſpect to thoſe who either are not, 'or profeſs that they are not enemies, yet *ſupply the enemy* 'with any ſort of commodities. For there were formerly, 'and lately, very ſharp conteſts upon it, ſome contending 'for the freedom of commerce, ſome for the aſſertion of 'the rigours of war.'* He then divides the articles of Neutral trade into three claſſes: one, conſiſting of things immediately uſeful in war; one, of no uſe at all; and one, of a doubtful or double nature. As to the firſt, he is clear, that whoever ſupplies them becomes an enemy himſelf, without making any difference, like Schlegel,† between poſitive and general law: the ſecond, he diſmiſſes as furniſhing no room for examination: the third, forms the ſubject of more extended diſcuſſion. It is here that he lays down thoſe general principles, from which all that I have adduced has been extracted and ramified: and it is here, that he explains himſelf more minutely on the authority of thoſe articles of the *Conſolato del Mare* that have been cited. Theſe are his words. 'In tertio illo genere uſus ancipitis, diſtingu-'endus erit belli ſtatus. Nam ſi tueri me non poſſum niſi

* De Jur. Bel. l. iii. 1, 5. 'Sed et quæſtio incidere ſolet, 'quid liceat in eos qui hoſtes non ſunt aut dici nolunt, ſed hoſtibus 'res aliquas ſubminiſtrant. Nam et olim et nuper de ea re acriter 'certatum ſcimus: cum alii belli rigorem, alii commerciorum libertatem defenderent.'

† Exam. Impart. 69, 116.

'*quæ mittuntur* intercipiam, neceſſitas, ut alibi expoſuimus, 'jus dabit, ſed ſub onere reſtitutionis, niſi cauſa alia accedat. 'Quod ſi juris mei executionem rerum ſubvectio impedierit, 'idque ſcire potuerit qui advexit, ut ſi oppidum obſeſſum 'tenebam, ſi portus clauſos, et jam deditio aut pax exſpec-'tabatur, tenebitur ille mihi de damno culpa dato, ut qui 'debitorem carceri eximit, aut fugam ejus in meam fraudem 'inſtruxit; et ad damni dati modum res quoque ejus capi, 'et dominium earum debiti conſequendi cauſa quæri poterit. 'Si damnum nondum dederit ſed dare voluerit, jus erit re-'rum retentione eum cogere ut de futuro caveat obſidibus, 'pignoribus, aut alio modo. Quod ſi præterea evidentiſſima 'ſit hoſtis mei in me injuſtitia, et ille eum in bello iniquiſ-'ſimo *confirmet*, jam non tantum civiliter tenebitur de damno, 'ſed et criminaliter, ut is qui judici imminenti reum mani-'feſtum eximit; atque eo nomine licebit in eum ſtatuere 'quod delicto convenit, ſecundum ea quæ de pœnis diximus; 'quare intra eum modum etiam ſpoliari poterit.'* To this muſt be added the long chain of hiſtorical evidence contained in his note, but which it is far too long to detail at large.

Now, upon theſe paſſages we may remark, in the firſt place, that no immediate mention is made of the queſtion before us; but, that on the contrary, from the very words, *res aliquas ſubminiſtrant*, and the circumſtance of dividing the whole of the trade of Neutrals into three articles, all confined *to their own particular commerce*, it is clear, that their claim to a *carrying trade* had never entered his mind. It is clear, alſo, from the nature of the long ſeries of examples in his note, which, although they are introduced expreſsly to elucidate the poſitions of the text, which treats, to uſe his own words of the 'belli rigor, and the commericum 'libertas,' yet, are all in illuſtration of a very different queſ-

* De Jur. Bel. p. 11, 1, 5, 3.

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tion indeed; namely, whether a Belligerent has not a right to interdict all commerce whatsoever between Neutrals and his antagonist. This, also, is manifestly his intention, from the sense in which his commentator Gronovius understands it; who explains the words 'commerciorum libertatem,' to mean, 'licere unicuique merces *suas* portare ac vendere ad quos voluerit.'*

In former times, that question was agitated with a great deal of heat, and without any precise settlement, in point of fact; which unsettled state lasted through the fifteenth, sixteenth, and part of the seventeenth centuries. We saw that it was set up by the English and Dutch Allies, so lately as in King William's war, against France,† but was abandoned in that more enlightened time, on account of its injustice. But, in the days of Grotius, the right was still contested, and every one of the historical examples which he records, except some of those important extracts from the Consolato, that have been cited, applies to that unsettled point alone. The question, therefore, of free ships making free goods, is not only not immediately before him, but from that very circumstance, it is proveable, I think, to a demonstration, that he had never, even heard of it as a claim.

But, though the question is not before him in form, because Europe had not yet even raised it; his decision of it, as a point submitted to, and acted upon by all, without question, is abundantly to be collected; for, as has been said, he transcribes, in terms, the provisions upon it from the Consolato mentioned before, and without any comment, as a thing not to be disputed: in speaking also, in his note, of the ordinances of France, which allow the 'libertas 'exercendi pacatis populis,' (the mere liberty to trade with

* De Jur. Bel. l. iii. 1, 5. note 21.
† By the treaty of Whitehall, Aug. $\frac{1}{11}$, 1689. vide sup.

the Belligerent), he adds, as if it was a thing wonderful, and pointedly againſt the *known*, not the *diſputed* law, that it was allowed to be exerciſed ‘ *adeo indiſcrete*, ut hoſtes ſæpe ‘ ſub alienis nominibus res ſuas occultaret.* But in addition to this, from the mode in which he handles that other queſtion, which we ſay *was* before him, it is plain that he goes a great deal farther; ſince not even to negative it entirely, carries the right of the Belligerant farther than thoſe who merely negative the doctrines of the Armed Neutrality; for it is much worſe to ſay that a neutral veſſel ſhall not carry on his own trade with the Belligerent, than that he ſhall be inhibited from interpoſing in the trade of the Belligerent himſelf.

That there are caſes in which it is the opinion of this wiſe man, that the trade of a Neutral with one Belligerent, in articles of a double nature, may be ſtopped by the other, is inconteſtably clear from the whole frame and texture of the ſentences in our contemplation. In the very outſet he obſerves, that it will depend upon the particular ſtate of the war: ‘ for it,’ ſays he, ‘ I cannot defend myſelf unleſs ‘ by intercepting the merchandiſe that is ſent to my enemy, ‘ the law of neceſſity will give me the right to do ſo, upon ‘ condition of reſtoring them, unleſs ſome other cauſe pre- ‘ vent it. But if the carrying things to my enemy prevent ‘ the aſſertion of my juſt right, and this is known to the ‘ Neutral; as if I hold a place beſieged, or a port blockaded; ‘ *he ſhall anſwer to me in damages for his fault*, in the ſame ‘ manner as he who aſſiſts in defrauding me, by aiding my ‘ debtor to eſcape from priſon. If he has not yet actually ‘ given this aſſiſtance, but only intended it, then I may de- ‘ mand ſecurity of him for the future, by pledges, hoſtages, ‘ or in any other manner. If, however, my cauſe for war

* De Jur. Bel. l. iii. 1. 5 note.

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'is manifeſt, and he ſtrengthen and maintain my antagoniſt, 'then he ſhall not only anſwer civilly but criminally for the 'miſchief he occaſions, as he is puniſhed who has been 'guilty of a reſcue, or ſcreens a criminal from juſtice.'

Upon this ſtrong mode of expreſſion there has never yet been a difference of opinion. Caſes may, undoubtedly, ariſe, and are perpetually ariſing, in which the application of the principles may be diſputed; but the principles themſelves are clear, preciſe, and general, and their meaning is manifeſt as their conſequences are important. It may, indeed, poſſibly be urged, that the illuſtration he gives of the breach of a blockade, about which there is no difference of ſentiment, points his aſſertions to one particular exigency; but, independant of the circumſtance that that example is brought forward in illuſtration of only one of his poſitions; the univerſality in which all the reſt are laid down; the tenor of theſe words '*ſtatus belli*,' which is a general deſcription; of '*juris executione*,' which is the very right to take arms; of '*pax expectabatur*,' which is a final termination of hoſtilities, not the ſurrender of the beſieged place; and, laſtly, of '*bello confirmet*,' which is demonſtrably applicable to the whole field of war: theſe, I ſay, prove him to be occupied with the general plan of operations, and the general exigencies of a ſtate of hoſtility. But, above all, the marked ſhades of difference that appear in the injuries done, and in the meaſures to reſiſt them; the rule of reſtoring in ſome caſes, but of puniſhing in others; of taking pledges againſt intentions, but of vengeance againſt crime; remove all doubt and myſtery from the ſubject.

Grotius, then, in the general principle altogether, and on this particular queſtion, whenever it came before him, is as ſtrong a champion as we can have againſt theſe new and momentous claims of the Armed Neutrality—claims which, as lawyers, we might laugh at as frivolous and new-fangled, but that we are forbidden all levity or unconcern on a ſubject

ject on which intereſts of ſuch critical magnitude depend: intereſts that involve in them no leſs than the exiſtence of commerce, the fortune and blood of thouſands, the fate of Empires, and the univerſal rights of war.

The next authority which I ſhall mention is that of a man of no mean fame for knowledge and learning in a ſcience in which he was the firſt of his time, and the repreſentation of a great King. I mean Albericus Gentilis; the only one almoſt of his predeceſſors from whoſe labours (notwithſtanding he blames him in many points) Grotius confeſſed that he derived advantage in his great work*. Stating the caſe of Turkiſh property found by their enemies, the Florentines, on board an Engliſh veſſel which was neuter, he gives this opinion, without ever thinking that any doubt had been raiſed upon the principle, either by the laws of Nature or the pretenſions of men; 'tranſeunt res cum 'ſuâ cauſa, victor ſuccedet in locum victi, tenetur Etruſcus 'pro toro naulo.

Albericus Gentilis wrote in the beginning of the ſeventeenth century: he was followed by his contempory Grotius, whoſe work was publiſhed while the reputation of Albericus was at its height: but although that work was in itſelf ſo comparatively perfect that the writings of the advocate of Spain, as he was called, were ſeldom afterwards conſulted; yet, as we have ſeen, there was little or no difference between them upon the point before us. The opinions of both were adopted by the beſt writers of their time, during the whole of that century; by Voet, who publiſhed ſome little time after Grotius; by Zouch†, the beſt Engliſh Civilian of the age; and by Loccenius §, the

* D. J. Bel. P. Prolegom.

† De Jur. Militari c. 5. n. 21.

‡ De Jud. inter Gentes, p. 2. ſ. 8. n. 6.

§ De. Jur. Maritimo, 2, 4, 12.

hiſtory.

hiſtorian of Sweden, who, with his mind full of Guſtavus Adolphus, the moſt juſt King and moderate Commander in Europe, confirms the *Conſolato* upon this queſtion in all its extent.

On the other hand, no writer of any ſort of reputation, that I know of, or rather no writer at all is to be found, who upholds the contrary doctrine during that century. They all fly to the *Conſolato* as to a land-mark with reſpect to the principle—as a general law, not to be overthrown, and whoſe overthrow, in theſe points, was never even attempted. Where it was attempted, in that other much greater queſtion of the times, Whether a Belligerent might not prohibit all commerce with the oppoſing Belligerent; we have ſeen that, after ſome doubts about it among Civilians, and very ſtrong oppoſition among States, it was confirmed and ſettled, as it ought to be, as a general law, though ſubject, like all general laws, to exceptions founded on the exigency of the caſe.—I have no heſitation in thinking that it was the conteſtation and ſettlement of *this* queſtion, that has miſled the Daniſh Civilian into the aſſertion, that the proviſions of the *Conſolato* upon the *other*, were changed, by agreement, about the ſixteenth century; and that the principle I am canvaſſing became *paramount* in the ſeventeenth.

But while all the world were diſcuſſing one of theſe chief articles of the *Conſolato*, whoſe ſoundneſs or unſoundneſs was conſidered with all the warm eagerneſs and critical acumen which ſtrong conteſts and paſſions on both ſides, never fail to generate; when the real and juſt rights of Neutrals at laſt prevailed in the conteſt, and they were allowed the liberty of traffic, which had been diſputed with them; it would have been wonderful that they ſhould ſtop here, and not obtain emancipation from the *other* pretenſions of Belligerents, which is now before us, could they have made it appear, with equal cogency, that it was not founded in equity and reaſon. This, however, was not

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even attempted; and it was long, as a principle of right, the unoppoſed law of Europe, while the other was always bitterly conteſted. The Venetians and Genoeſe, in the height of their wealth and maritime greatneſs, founded chiefly upon this very carrying trade, ſo far from oppoſing it, had joined in being the authors of the law. It was thoſe other great carriers, the Dutch, who, feelingly alive to the cauſes of their wealth, ſaw all the advantages of an alteration, and firſt attempted a change. But how did they attempt it? Not by ſetting up a new code, founded, as it is ſaid *in natural juſtice, and ſupported by an Armed Confederacy*; not by pretending to a right to break all their treaties at will, becauſe, contrary to a chimerical notion, bottomed in vain wiſdom and falſe philoſophy; but by long, laborious, and painful negotiation; by watching opportunities, and cultivating particular diſpoſitions; by ſoothing particular intereſts, and making compenſations; in a word, by the juſt and lawful mode of mutual contract*. Nor is it unimpor-

* Lettres et Negot. entre De Witte et Boreel, tom. i. 2. and Thurloe's State papers, chiefly 3, 4, and 5. Whoever will take the trouble of peruſing De Witte and Boreel's letters during the negotiation of the latter in France, about the year 1654, and the conferences of Nieuport, the Dutch Ambaſſador, in England, will find the fulleſt proofs of the anxiety of the Dutch Government to carry this point, as neceſſary to their own particular trade. 'On 'attend,' ſays Boreel, 'ici avec beaucoup d'impatience quelle 'ſera le fin des negociations des Ambaſſadeurs Extraordinaries de 'leur H. H. P. P. en Angleterre touchant le Traité de Marine. On 'eſpere qu'on y obtiendra la clauſe Vaiſſeau franc, Cargaiſon 'franche. Autrement on m'avertie de divers endroits ou l'on eſt 'bien intentionée pour la Republique que ce ſeroit un terrible 'contre coup pour la navigation des ſujets des Provinces Unies, 'qui perdroient les avantages qu'ils retirent de charger chez 'toutes les Nations.' Lettre 27me Nov. 1654. Again, 'il eſt im-'poſſible d'obtenir le contenu de mes inſtructions ou il eſt dit que 'la franchiſe du Bâtiment en affranchit la Cargaiſon même appar-'tenant à l'ennemi: à la verité on me fait eſpere que des que la 'paix ſera faite avec l'Eſpagne on ne fera pas beaucoup de difi-'culté,' &c. &c. Lettre 28 Nov. 1658. Nieuport underwent ſtill more delay and mortification in England; and the negotiation failed at laſt. It was not till after another war, an interval of twenty years, and a change of politics in England with reſpect to France, that the Dutch perſeverance at length prevailed, on the ground of mutual advantage in the treaty at large.

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tant to obſerve, that this was during a ſeries of years in which Holland was at the zenith of its power, its military ſpirit, its naval reſources, and its naval pretenſions; when ſuch fiery men as Tromp and de Ruyter were ſtill more inflamed to military adventure againſt this country, by perſonal rivalry with the braveſt of her heroes; and when De Witt, the ableſt of his time, one of thoſe extraordinary men whoſe breath ſeems to influence the fate of nations, and create a new order of things, was always ready to riſk the whole force of his State rather than ſubmit to the leaſt invaſion of its commerce. But he was, beſides this, animated by a perſonal ſpirit againſt England. His power and pre-eminence in Holland depended upon the depreſſion of the Houſe of Orange, connected by blood, and always ſupported by the Engliſh Royal Family. He had formed the whole plan of his politics upon a particular ſet of favoured, and long-foſtered maxims of national intereſts, amongſt which this of Vry Schip Vry goed was the moſt favoured of all; and almoſt all were thwarted, and many overthrown by Engliſh exertion and Engliſh laws. The Navigation Act gave a death's wound to the trade of Holland; and thus the oppoſers of his own and of his country's power, rivals in trade, rivals in arms, interfering every where, and fighting often with doubtful ſucceſs, it is hardly in the nature of things that De Witt would not have been the firſt to have ſhewn, againſt England, if he could, the *natural obligations* of his maxim, in order to ground upon them the plan of an Armed Confederacy. Of ſuch a confederacy, and of the ſucceſs of its efforts, he would not have wanted an example in the conduct of his own Republic, and almoſt within his own time. The King of Denmark, not a great many years before, had aimed at a ſort of tyranny in the Sound, by impoſing what tolls he pleaſed, which not only fell heavily upon the trade of the Baltic, but evinced a diſpoſition to impoſe of which it was impoſſible to ſee the ex-

tent. The Commonwealths of Holland and Lubec, perceiving the danger, aſſociated themſelves together, not to attack the King of Denmark by name, but for the general protection of the trade of the North. To this union they invited various others of the Hanſeatic States to accede, and at length it was ſtrengthened by the junction of Sweden, to the full accompliſhment of the end propoſed.

The preamble to the firſt Treaty of Union was conceived in theſe terms. 'As of antient times, the honourable, 'free, and imperial city of Lubec, and ſeveral other towns, 'ſituated on the Northern and Eaſtern Seas, have been in 'union and amity with divers towns of the free and United 'Provinces, for the defence *of the liberty of navigation*, '*trade*, *and commerce*, and the rights and privileges there-'unto appertaining: and as now they have found it neceſ-'ſary to negotiate and treat concerning the renewal of the 'ſaid Union, their deputies have conſented to the follow-'ing articles:

'That this Union is not intended to give offence to any 'one, but ſolely for the preſervation of the free navigation 'and commerce of the Northern and Eaſtern Seas: that 'their deſign is according to the Law of Nations, merely 'to aſſert the liberties, rights, and immunities, which have 'been granted to them in thoſe Seas; and they will reci-'procally defend and protect one another againſt all thoſe 'who moleſt and hinder the ſaid freedom and liberty of 'trade.

'That by this Union they mean not to prejudice, in the 'ſmalleſt degree, their friendſhip with the Emperor, or the 'Kings of France or Great Britain.

'That thoſe who ſhall trouble and moleſt their com-'merce, ſhall be firſt *requeſted* to deſiſt from ſuch conduct; 'which if they will not do, they will vigorously defend 'themſelves, ſo that the object of the Union, and the free-

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'dom of navigation and commerce ſhall be at lengrh ſe-
'cured.'

The articles then go on to ſtate the quotas of troops and veſſels which each ſhall furniſh, and various other detached regulations, in caſe of being driven to war.*

In April, 1614, another treaty was made, by which Guſtavus Adolphus acceded to the Confederacy†; and in December, 1615, the Hanſeatic Towns in general united themſelves with it, to the complete attainment of their object, in the regulation of the tolls of the Sound.‡ And we have by no means an incurious precedent, in many of its ſtipulations, of the plan upon which the Confederacy in 1780 proceeded.

The ſucceſs of this armed league between Holland and the Hanſe Towns produced another, thirty years afterwards, between that Republic, and Bremen, and Hamburgh, again profeſſing, that it was not formed to give umbrage to any one, but to defend the freedom of commerce and navigation, according to the Law of Nations, againſt all. The ſame effects followed; and, in 1645, by the treaty of Chriſtianople with Denmark, the tolls of the Sound were regulated for fifty years, the right of ſearch in the Baltic was confined to the inſpection of papers, and many other articles of the Northern Commerce ſettled ſo as to prevent future diſpute.‖

But with the effect of all theſe confederacies in his mind, ſo near in point of time to his own age, and his own very country their original inſtigator, it is wonderful that De Witte did not think of renewing them againſt England, in the ſame general manner, and for the ſame general purpoſe, *under the Law of Nations*, as his predeceſſors had framed them againſt Denmark. Probably he would have done ſo,

* Du Mont Corps Dip. 10, 232. † Id. 246.
‡ Id. 276. ‖ 2 Pollieth. 154.

had he really thought that his maxim, so important to the interests of Holland, and all the North, was clearly founded in natural justice. He would have found Denmark in particular well disposed to join with him; and that he did not do so, can only be explained by the knowledge, that, interested as he was, he was yet too wise to attempt the juggle of proving to a Belligerent, that to carry the goods of his enemy for him, when he could no longer do it himself, was not to afford him assistance in the war. Accordingly, he laboured for a long time, and laboured in vain, both with England and France, in order to persuade those powers to grant by treaty, what he never thought of demanding as a right.

We are then founded in saying, that during the seventeenth century, the right to confiscate enemy's property on board a neutral vessel, was never, *as a principle*, contested, though there were frequent attempts, which were sometimes successful, to modify and change it by treaty. Still more should we be founded in thinking, that even before that time, the *principle* remained sacred amongst all Maritime States. As *Hubner*, however, has dwelt much upon historical proofs of the *liberty of commerce*, and as Vaisseau Franc Cargaison Franche is one of the great objects of those who quote him, we may suppose that he founds it upon these proofs, which, in times when general trading is allowed, would otherwise be totally useless; and as, besides, the new civilians dwell much upon his authority in every thing, it will not be unimportant, in a treatise like this, to examine, in the detail of his examples, not, perhaps, what it is that he means, but what is really proved.

'C'est l'evidence,' says he, 'du droit qu'ont les Peuples 'Neutres de commercer librement avec ceux qui se font la 'guerre, qui en a fait convenir les Nations Maritimes *de* 'tous les siecles; jusqu'à ce que des vûes d'une cupidité sans 'bornes, ou celles d'une ambition démesurée, ont fait changer

'changer à quelques-une d'entr'elles, ſi non d'avis ou de 'langage, du moins de conduite à cet égard'.*

Now, if this means merely to prove what Europe has never with any uniformity conteſted, and what ſhe has now at length ſettled for a century and a half paſt, I mean the general right of Neutrals to *trade* with a Belligerent, or that neutral veſſels ſhall not be confiſcated for having enemy's property on board, England certainly is no where pledged to diſpute it. But if by '*commercer librement*' it means to ſtate from *hiſtory*, that the right ſet up of purſuing enemy's property into neutral ſhips, was the pretenſion alone of a 'cupidité ſans bornes,' and diſallowed as a principle; we deny the authority in every one of the examples adduced.

His firſt caſe is from the Hiſtory of Pompey, who, he ſays, in the ſpirit of the Roman power and ambition, in the Mithridatic war eſtabliſhed guard ſhips in the Boſphorus, ordering them to intercept and to puniſh, with death, all thoſe *who dared to ſail thither for the purpoſes of commerce.* For this he refers you to Plutarch, who, when you have conſulted him, tells you ſo different a ſtory, that the admirers of Hubner muſt tremble even for his good faith. The hiſtory is, that Pompey having purſued Mithridates through Aſia Minor into Boſphorus, in which he had ſhut himſelf up with an army, reſolved to reduce him by famine; for which purpoſe he appointed a guard of ſhips to lie in wait for the merchants that ſailed to the Boſphorus, *having prohibited all, upon pain of death, to carry proviſions or merchandiſe thither.* † Who theſe merchants were, is no where expreſsly ſtated; but from the extent and ſituation of the Roman Empire, at that time, it will be difficult to imagine that they were any other than thoſe that owed obedience to Rome. But, even if they did not, Pompey had then over-

* Hub. p. i. ch. iv. ſec. 7. † Tonſon's Plutarch, iv. 162.

come his enemy in every field where he had ſtood him; he had purſued him to the ſea, whence he took meaſures to prevent his eſcaping, and where he had concerted a deſign, *of which he gave notice*, to reduce him by famine. Even then, if they were, or could have been, *foreign* merchants, ſo far in this example are we from obſerving the mere effect of Roman power and ambition, that we, in fact, ſee little more than the regular rights of a modern blockade: the difference conſiſts in the puniſhment alone, and death, inſtead of confiſcation, was the plain reſult of the barbarous ſpirit of the times.

Hubner's ſecond caſe is drawn from France, whoſe ſentiments and conduct, he ſays, in the preceding ages, were far more equitable upon the ſubject; her government never having then troubled the navigation and commerce of Neutrals with its enemies; for which he refers, as a proof, to the 42d chapter of the ordinances of 1543 and 1584, where, he ſays, we find regulations, conformable with the deciſions of the univerſal code of ſovereign ſtates, on the ſubject. Unfortunately I have done as he directs me, and conſulted theſe ordinances, at leaſt in Valin's Commentary upon the III. Book. Tit. IX. des prizes, article VII. where I find that *all ſhips* which are found laden with enemy's property are good prize, which, Valin ſays, ſeems to be a conſequence of the 42d article (I ſuppoſe article here is the ſame as chapter) of the ordinance of 1543 and 69th of that of 1584, where was laid down, that only the property found was ſubject to confiſcation. *

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* 'Il ſembloit réſulter de l'article 42, de l'ordonnance de 1543, et 'du 69 de celle de 1584, qu'il n'y avoit que la marchandiſe des 'ennemis trouvé dans un navire ami qui fut ſujette à confication ſans 'toucher au navire ni au reſte de ſon chargément; du moins c'eſt ainſi 'que Clairac avoit interprété ces deux ordonnances dans ſon traité de 'la juriſdiction de la marine.' Art. xxv. p. 443. If Clairac could be 'miſtaken, it is to be obſerved, that the only other interpretation that could

His next example, cited for the ſame purpoſe, ends exactly in the ſame manner, upon recurring to his own references. It was in conſequence of theſe principles, ſays he, that Queen Elizabeth teſtified her reſentment againſt the Zelanders, by her ambaſſadors, Winter and Beal, for preſuming to ſtop her ſhips deſtined for the ports of Spain, the enemy of Holland.* For this he refers to Camden, and Camden tells you, that 'the Prince of Orange, in hopes to 'retain his principality, ceaſed not to invite the French into 'the Netherlands, and permitted the Zelanders and Hollanders (who infeſted the ſeas round about with their *piratical* veſſels, being men, as it were, born in the ſea), *to rob* 'the Engliſh merchant ſhips, whom they accuſed, to carry 'victuals to their enemies, the Dunkirkers, and to tranſport 'the merchandiſe of the Antwerpers and others into Spain 'under counterfeit names, which they were wont themſelves 'to export formerly to their own advantage, but now durſt not, 'as being conſcious to themſelves of their revolt. For reſtraining of theſe, Holſtock, being ſent forth again with men 'of war, took above 200 pirates, and put them in priſons all 'along the ſea-coaſt. But to demand reſtitution of the goods 'they had taken, there were ſent into Zeland, Sir William 'Winter, Knight, and Robert Beal, Clerk of the Council, 'to conſider of the value of the things in controverſy, and 'agree about reſtitution upon certain conditions. But, by 'reaſon of the avarice of the Engliſh merchants, and the inſolency of the Zelanders, the quarrel broke out again, 'which was ſhortly after compounded with loſs to both nations.'†

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could be given would militate ſtill more ſtrongly againſt the rights of Neutrals, and confiſcate the veſſel for carrying the goods: the remark of Valin being, that the law of 1543 and 1584 was milder, according to Clairac, than that before him, which did ſo confiſcate the Neutral veſſel. 2 Val. 252.

* 1 Hub. 77. † Camd. 214.

Now, upon this we may obſerve, firſt, that the pretence of the Zelanders was either true or falſe: ſecondly, that reſtitution was withheld. If reſtitution was withheld becauſe the pretence was true, nothing that could happen in hiſtory, could prove with more point and weight, that the principle we contend for was amply allowed in this very example; for no one that ever heard of her, but knows the high ſpirit, as well as the power of Elizabeth, to reſiſt illegal violence. If it was withheld, however, although the pretence was falſe, it proves the piracies of the Zelanders, but nothing at all as to the point: and it happens peculiarly, that, by the teſtimony of their own hiſtorian, in the very time, and in the very years alluded to, the Zelanders, from diſtreſs, and want of ſubſiſtence, occaſioned by the preſſure of the Spaniards, were driven to become pirates for ſuch ſubſiſtence; eminently in this confirming the expreſſions of Camden, that they were permitted to *rob* the Engliſh merchant ſhips.*

His fourth example, by being too general, proves nothing.

The Engliſh, it ſeems, allowed to the Hanſe Towns, that it was the right of Neutrals to traffic with Spain, but ſaid that they had parted with this right by particular convention. At the ſame time it cannot be too often inculcated, that the queſ-

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* 'Quand il n'y avoit point d'argent a la main, pour payer les Matelots, ni de vivres pour les nourrir, ils alloyent en mer, & y prenoyent ce qu'ils y rencontroyent. Tellement que les admiraulx, les capitaynes, et gens de marine, n'avoyent ſouvent rient à manger, ſinon des harengs ſalés, ni rien à boire que de l'eau, ou de la petite biere. Les biens & marchandiſes, non ſeulement des Eſpaignols, mais auſſi des Italiens eſtoyet adjugées pour bon butin, pource qu'ils envoyet (comme ennemis) des gens devant Haerlem, ou eſtoit le regiment de la Ligne, qui eſtoyent Italiens. Ils prenoyent auſſi tous les batteaux, qui vouloyent aller en Flandres. *Et quand la neceſſité les preſſoit, ils prenoyent tout ce qu'ils trouvoyent, & le vendoyet pour j'en vuider.* Et pource que ces facons de faire, *ne tournoyent pas à grand honneur & louange, tant pour les Eſtats de Hollande & de Zelande.* Voyla pourquoy ils l'obligerent par lettres à payer le dommage fait, comme auſſi ils firent devant la fin de la guerre.' *Meteren*, 98, *d.*

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tion on the part of Neutrals is not concerning a general liberty to trade, but whether they may carry the trade of the Belligerent.

The next case is a famous one in our own history, on which our fondness for the memory of our great Queen has often delighted to dwell. It is her well-known contest with Dzialine, the Polish Ambassador; far enough, indeed, from supporting any position of Hubner, and, like most of the rest, falling upon himself. His account of it is, as usual, lost in generals; so that we know nothing but 'les 'obstacles que l'on mit à son commerce ordinaire avec 'l'Espagne, en declarant que c'etoit contre le droit des gens 'que les Anglois l'empêchoient de trafiquer librement avec 'le Royaume.' What 'trafiquer librement' here means specifically is, as usual, left in the dark; and unexamining the authority, which does not even hint at what sort of traffic the Poles had attempted, so as to occasion an interruption of it by the English; we are either lost in the same indefiniteness, or must come at once to the contemplation of contraband. 'For your part,' said the Queen, 'you seem, indeed, to us to 'have read many books; but yet to have little understanding of politics. For whereas you so often, in your oration, make mention of the Law of Nations, you must 'know that, in the time of war betwixt Kings, it is 'lawful for the one party to intercept the *assistance and* '*succours* sent to the other, and to take care that no damage 'may grow thereby to himself. This, we say, is agreeable 'to the Law of Nature and of Nations, and hath been 'often practised, not by us alone, but also by the Kings of 'Poland and Sweden, in the wars which they have had 'with the Muscovites.'

Thus far the Queen herself. He was afterwards told by her Council, consisting, amongst others, of the two Cecils, 'that to intercept succours sent to the enemy was not 'against the Law of Nations, seeing it was ordained by

'nature, that every one ſhould defend himſelf; and this is 'not a written law, but born and bred in us. Moreover, 'that it was yet freſh in memory, how the Kings of Po-'land and Sweden have confiſcated the Engliſh ſhips and 'merchandiſe, upon the bare ſuſpicion *that they had aſſiſted* 'the Muſcovites with proviſions.'* Here is the real ſtatement of the caſe quoted from the authority referred to; and a caſe leſs ſerviceable to the cauſe it was meant to ſupport, or leſs candidly ſtated by the reporter, one would think it would not be very eaſy to point out.

The next is an example without any reference; but it is of the leſs conſequence, as it proves abſolutely nothing to the point in hand. The Hanſe Towns, it ſeems, at war with Denmark, exacted of the Dutch, that they would not trade with the Danes; to which they replied, as they might very fairly do, that they had a right to do ſo, and would not deſiſt from exerciſing it.†

The ſeventh caſe is of Sweden and England. In 1653, the former having aſked an explanation as to the latter's intentions with reſpect to Neutral Commerce, the Parliament replied to the Swediſh Commiſſioner, that, let them abſtain from warlike ſtores, and they were at liberty 'commercer ou bon leur ſembleroit.'‡ Whether this is thus exactly to be found in the reference which he gives to Puffendorf's Hiſtory, (which I have ſearched in vain), as is of no great conſequence, ſince again the word *commercer*, the very eſſence of all indefiniteneſs on the ſubject, is the ſole mark of what is meant to be conveyed; and conſequently it never can imply a right to carry enemy's property.

The ſame [illegible] applies to his eighth example, where the city of Lubec, 'ayant pris la méme precaution au

* Camd. 536, 7. † Hub. i. 73. ‡ Ib.

commencement de la guerre (in the time of Elizabeth), et ayant fait demander qu'elle fureté ils auroient pour leur commerce et *qu'elles marchandijes il lui ſeroit permis d'envoyer en Eſpagne*,' were told that, if they abſtained from ſending arms, '*et d'autres attirails de la guerre*, il lui etoit libre d'y commercer avec toutes ſortes des marchandiſes.' Upon both theſe caſes, however, particularly the laſt, it is to be obſerved, that the very circumſtance of aſking what ſecurity they ſhould have for their commerce, proves almoſt to demonſtration, that they did not conſider even general trading as a matter of right then ſettled in the Law of Europe, as it ſince has been. Much more does the queſtion, 'What ſort of goods they ſhould be allowed to ſend to 'Spain,' prove, that in all ſuch caſes as theſe the word *commercer* never means, nor is intended to mean, a right to the enemy's carrying trade.

The ninth example is merely of the ſame nature with the others. Sweden, in its war with Ruſſia, ſeized Engliſh veſſels bound to Livonia. The Engliſh proteſted againſt it, becauſe they had a right, being Neutral, to trade with Belligerents.

But I think the ſummit of Hubner's miſmanagement, in regard to hiſtorical proofs, is reſerved for his tenth and laſt caſe:—a caſe relied on (but to me moſt ſtrangely) by all the innovators upon the Law of Maritime Capture, becauſe, as I ſuppoſe, it ſprings from England, and is argued with England. Whether it is decided againſt her, take Hubner's own account of what was decided, conſult the authority, and ſee how it applies. In this example he aſſerts, from the *Expoſition des Motifs, &c.* that Lord Carteret and Lord Cheſterfield, Secretaries of State at different times, declared to the Pruſſian miniſter, that the ſubjects of his country might every where continue their commerce, provided they abſtained from contraband and breach of blockade; *and that, as to the reſt, the trade of Neutrals ſhould remain upon the ſame footing as it*

was in time of peace; and he refers to the ſecond, third, eighth, and ninth articles. It is to be recollected alſo, that the conteſt in the Expoſition des Motifs is chiefly, and almoſt ſolely, confined to the queſtion of the right of carrying enemy's property.—Thus far the ſtatement; now obſerve the truth.

In the firſt article, the real queſtion aſked by the Pruſſian agent is, to be informed from the Engliſh Miniſtry, *of what ſpecifically was held contraband with them*; and whether grain, timber, planks, hemp, linſeed, linen, and the like, were comprehended therein, *that the King might adviſe his ſubjects thereof, and give them the neceſſary inſtructions upon the manner in which they ſhould continue their commerce.**

The ſecond article (the firſt referred to by Hubner) contains the anſwer: That the King's flag ſhould be reſpected *equally with that of other Powers in the alliance of Great Britain*, excepting only ſuch veſſels as ſhould carry warlike ſtores to the enemies of the Britiſh nation.

The third article (alſo referred to) certainly contains the ſtatement; as far as 'that commerce ſhould remain free to 'Neutral Powers;' but the important words, 'upon the 'ſame footing as in times of peace,' are contained under an explanatory N. B. apparently by the Pruſſian miniſters themſelves.

'That, for the reſt, the commerce ſhould remain free 'to the Neutral Powers;—*N. B. upon the ſame footing as in times of peace.*' †

In the eighth and next article referred to, however, Lord Cheſterfield's anſwer is, that the King of Great Britain will offer no hindrance to Pruſſian navigation; *ſo long as they ſhould exerciſe their commerce in an allowable*

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* Expoſit. des Motifs, &c. Art. I. † Ib.

way, and ſhould conform to the ancient cuſtoms eſtabliſhed and received between Neutral Powers.

The ninth article merely reiterates Lord Carteret's declaration.

Upon theſe articles it is ſcarce neceſſary to point out, that although the queſtion in the Pruſſian expoſition directly concerns the *carrying trade*, the queſtions to the Engliſh Government, and the anſwers of its Miniſters, upon which the expoſition is emphatically founded, do not in the leaſt, much leſs ſpecifically, relate to it. Suppoſing even the N. B. at the end of the third article to be Lord Carteret's own explanation, it can never mean to relate to more than the queſtion originally put, which was the baſis of all theſe other explanatory queſtions. This we ſee, in terms, was nothing more than to know, *what was held contraband by the Engliſh Miniſtry*, in order that the ſubjects of Pruſſia might tell by what rule to direct their trade. Lord Carteret's anſwer muſt, therefore, relate to contraband, and contraband alone; for it would have been ſtrange if he had voluntarily granted more than was aſked; and ſtrange, indeed, if he had granted what England had uniformly, except by treaty, denied to all the world. This is the more clear, becauſe, when general complaints, and a more general queſtion, ſeem to have been put afterwards to Lord Cheſterfield, the anſwer then is, that certain things are granted, ſo long as *they ſhould exerciſe their commerce in an allowable way, and ſhould conform to the ancient cuſtoms eſtabliſhed and received between Neutral Powers.*

To put the matter, however, out of doubt, if doubt can yet be entertained; take the Sieur Andrie's, one of the Pruſſian Miniſter's own confeſſion, as to the law, in a letter to the King of Pruſſia himſelf, pending this controverſy with the Court of London. 'Your Majeſty's ſubjects 'ought not to load on board neutral ſhips any goods *really* 'belonging to the enemies of England, but to load them for 'their

'their own account, whereby they may fafely fend them to 'any country they fhall think proper, *without running any* 'rifk: then, if privateers commit any damage to the fhips 'belonging to your Majefty's fubjects, you may depend on 'full juftice being done here, as in all the like cafes hath 'been done'.*

And fo much for the hiftorical examples adduced by the great champion for Neutrality, to prove that the maxim, that free fhips make free goods, has always been acknowledged by Europe. That they muft have been adduced for this purpofe, or no purpofe at all, is, I think, clear, becaufe a general trade, on the part of Neutrals, with Belligerents, has, in the laft century, always been allowed, notwithftanding all the conteſts concerning it, that occurred in the preceding ages. It certainly was not denied by Great Britain, at the time when complaint was moſt loudly founded againſt her in the war of fifty-fix, about which time Hubner wrote; and why he fhould otherwife have recurred to examples (how accurately, however, we have feen), to prove what was not refifted, in a work which profeſſed to vindicate Neutrality from its injuries, I am wholly at a loſs to conjecture. It is, however, the clearer, that this muft have been his meaning, becaufe this chain of examples is introduced in the very chapter, and immediately after he had laid down their right, even to the colonial trade of Belligerents, whenever they chofe to let them into it; and in various preceding parts he is ſtrenuous in the aſſertion, that their rights of commerce are the fame (with the exception of contraband) with thofe which they had enjoyed in times of peace; and as in times of peace no one could queſtion their right to fuch carrying trade, as any nation chofe to allow them, the conſequence is inevi-

* The genuineſs of this extract is certified under his hand by Michel himſelf, the other Pruſſian Miniſter, when it was exhibited in a cauſe. D. of N. v. letter, in 1 Magens, 494.

table

table, that Hubner really thought the examples which have been detailed, bear him out in the aſſertion, that free ſhips make free goods. Schlegel, the pupil of Hubner, underſtands this to be the object of his book, although it treats merely of the general freedom of neutral commerce, and he does not heſitate to aſſert, (we will ſuppoſe not upon the faith of this hiſtorical reſearch) that he has developed the rights of the Neutral in a manner ſo convincing, that thoſe verſed in the law of nations 'ont depuis preſque unanimement 'reconnus la juſteſſe de cette axiome que le pavillon neutre 'couvre la marchandiſe.' * In vain, however, I think has hiſtory been conſulted, at leaſt in the inſtances given by this moſt strenuous advocate of Neutrality: in vain have authorities been ſought for to wrench the true bearing of facts, and the true meaning of language, into the ſupport of a principle, which, except by the ſtipulations by treaty, has not, in point of truth, been ever ſupported during the ages we have been examining. The uniform experience of Europe, in thoſe times, where treaty did not interfere to change the effect of the principle by poſitive contract, determines, beyond all doubt, that the principle itſelf was never brought in queſtion.

When I ſay this, however, let me not appear to be ignorant of what I know has often been aſſerted; let me not ſeem to avoid what I wiſh thoroughly to examine. Amongſt thoſe who ſupport the maxim as founded in natural right, a name is ſaid to be enrolled of ſuch great and weighty authority, that, if it is really ſo, the reaſoning that has been adduced will require ſtill greater defence, in order to ſtand unſhaken. It is of no leſs a man than Puffendorf, himſelf a tower of ſtrength upon any queſtion of the Law of Nations, which he has really eſpouſed. The ſenſible Barbeyrac, in his commentary upon his great work upon the Law

* Schlegel, 10.

of

of Nature and Nations, * has preſerved a letter of his upon the ſubject of Neutral Commerce, which has often been cited by thoſe who ſupport the maxim in queſtion, as proving that Puffendorf is entirely of that opinion. If we examine it with common attention, it will be found preciſely in the ſame ſituation with thoſe hiſtorical examples of Hubner which we have juſt been examining; either amounting merely to the aſſertion that, as a general rule, the Neutral has a right to trade with the Belligerent, which, it cannot be too often reiterated, no one denies him; or, amounting abſolutely to an authority againſt the maxim, in ſupport of which it is cited.

Let us hear Barbeyrac himſelf in introducing it into his notes, 'Au reſte pour ce qui regarde la queſtion, *ſi l'on peut* 'empêcher que les peuples Neutres ne traffiquent pendant le 'cours de la guerre avec notre ennemi, il y a une lettre de 'notre auteur, &c. &c.'†

It is to be obſerved, that Puffendorf no where entertains the queſtion of Neutral Commerce in his works; but, what is moſt important in this particular enquiry to know refers you, with full approbation, to the opinions of Grotius in the paſſages that have been cited at length.‡ The letter was written to Groningius, whom Schlegel calls 'fameux 'juriſconſult,' in King William's war with France, at the end of the ſeventeenth century. This civilian had undertaken to aſſert, I know not what claims on the part of Neutral Nations, but amongſt them this of a right to trade generally, which no one now withholds; but which then, as we have ſeen, was particularly diſputed by the Treaty

* L. viii. c. 6. † Puff. D. des Gens, l. viii. c. 6. notis.

‡ 'Au reſte ſi l'on veut ſavoir en quoi conſiſtent ces tempéramens auſſi bien que l'etendue des droits de la guerre, et par rapport à l'ennemi, et par rapport à ceux qui lui fourniſſent quelque choſe; *on trouvera la deſſus amplement de quoi ſatisfaire* dans le traité de Grotius au troiſieme livre.' Ibid.

of Whitehall.‖ Now, this particular circumſtance, together with thoſe others juſt now mentioned, of Puffendorf's approbation of Grotius upon the ſubject, and the very words of Barbeyrac in introducing the letter, let us at once, I think, into the true queſtion that was before Puffendorf when he wrote, which ſeems thus ſolely to have been confined to the pretenſion of England and Holland to cut off all trade whatſoever with France. With this guide to our minds in examining this important letter, let us proceed to look at the letter itſelf.§

'L'ouvrage, Monſieur, que vous promettez, touchant la Liberte de la Navigation, excite ma curioſité. C'eſt un beau ſujet, et ſur lequel perſonne, que je ſache, n'a encore fait de traité particulier. Je crains bien néanmoins d'en juger *parceque vous touchez dans vôtre lettre, que vous ne trouviez des gens qui vous conteſteront vos idées.* La queſtion eſt certainement du nombre de celles, qui n'ont *pas encore été établies ſur des fondemens clairs et indubitables*, qui puiſſent faire regle par tout le monde. Dans tout les exemples, qu'on allegue, il 'y a preſque toûjours quelque *choſe de droit, et quelque choſe de fait.* Chacun d'ordinaire *permet ou defend le commerce maritime* des Peuples Neutres avec ſes ennemis, ſelon qu'il lui importe d'entretenir amitié avec ces peuples, ou qu'il ſe ſent de forces pour obtenir d'eux ce

‖ Vide ſupra.

§ As to the other claims, whatever they were, which Groningius meant to ſet up, it is as in vain to enquire after them, as that they ſhould derive any weight from their author: ſince we are told by Barbeyrac himſelf, that being 'compilateur de trés mauvais gout les exemplaires *de ſa rhapſodie* ſont ſervi aux *epiciers et aux beurrieres* et par la ſont devenus rares.' Puffend. viii. 6. note. It is curious, after this, to hear Hubner's lamentation in the moment of telling you that Neutrals ought to be allowed to trade with Belligerents upon the ſame footing as in time of peace. 'The Baron Puffendorff,' ſays he, 'has written a ſhort letter upon this queſtion, which I have never ſeen. It ought to be in a book called Groningii Bibliotheca Univerſalis Librorum Juriſperitorum, and in the 163th page, *but I could not find the book at Paris.*' Hubner, i. 65.

qu'il

qu'il souhaité. Les Anglois et le Hollandois, peuvent dire *sans absurdité*, qu'il leur est permis de faire tout le mal qu'ils peuvent aux François avec qui ils sont en guerre, et par consequent d'emploier le moien le plus propre à les affoiblir, qui consistà traverser ou empêcher leur commerce: qu'il n'est pas juste que les Peuples Neutres s'enrichissent à leurs depens, et en attirant à eux un commerce interrompu pour l'Angleterre et la Hollande, fournissent à la France *des secours pour continuer la guerre:* d'autant plus que l'Angleterre et la Hollande, favorisent ordinairement d'une autre maniére le commerce de ces peuples, et leur donnent occasion de transporter et debiter ailleurs les marchandises de leur cru, ou de leur fabrique: en un mot, qu'on veut bien leur laisser en son entier le commerce qu'ils ont accoûtumé de faire en tems de paix; mais qu'on ne doit pas souffrir qu'ils l'augmentent à l'occasion de la guerre, au prejudice des Anglois et des Hollandois. Mais comme cette matiére du commerce et de la navigation ne dépend pas tant de regles fondées sur une loi generale, que sur les conventions particulieres entre les peuples: pour pouvoir porter un jugement solidé de la question dont il s'agit, il faut examiner avant toutes choses, quels traitez, il y a eû la-dessus entre les Rois, du Nord, et l'Angleterre ou la Hollande, et si celles-ci leur ont offert des conditions justes et raisonnables. *D'autre côte néanmoins si les Rois du Nord peuvent maintenir leur commerce avec la France, en faisant escorter les vaisseaux marchands par des navires de guerre, pourvu qu'il n'y aît point de marchandises de contrebande, personne n'y trouvera à redire:* la loi de l'humanité et de l'equité entre nations, ne s'entendant pas jusqu'à exiger que, sans aucune necessité, un peuple se prive de son profit, en faveur d'un autre. Mais *comme l'avidité des marchands est si grande, que, pour le moindre gain, ils ne font aucun scrupule d'aller au de la des justes bornes:* les Nations, qui sont en guerre, peuvent faire visiter les vaisseaux des Peuples Neutres; et, s'il s'y trouvé

des

ces marchandiſes defendues, les confiſquer de plein droit. D'ailleurs, je ne ſuis pas ſurpris que les Rois du Nord aient plus d'egard à l'interêt general de toute l'Europe, qu'aux plaintes de quelques marchands, avides de gain, qui ne ſe soucient pas que tout aille ſans deſſus deſſous, pourvû qu'ils ſatisfaſſent leur avarice. Ces mêmes Princes jugent ſagement, qu'il n'eſt pas à propos pour eux de prendre des meſures precipitées, pendant que d'autres peuples travaillent de toutes leurs forces à reduire dans un etat de juſte mediocrité cette puiſſance inſolente, qui menace de mettre toute l'Europe dans ſes fers, et en même tems de ruiner la Religion Proteſtante. Ce qui etant auſſi de l'interêt des Couronnes du Nord, il ne ſeroit ni juſte, ni raiſonnable, que, pour un petit profit a tems, elles troubl'aſſent un deſſein ſi ſalutaire, dont on tâche de venir à bout ſans qu'il leur en coute rien et qu'ils courent aucun riſque,' &c.

Upon this letter it is to be obſerved preliminarily, that, although the queſtion was concerning the right to inhibit all traffic whatſoever, (certainly the carrying trade is never once mentioned or glanced at), yet he tells Grotingius that he would find many who would diſpute his 'poſitions; 'that Great Britain and Holland could ſay, without abſur-'dity, that it was allowable for them to do all the miſchief 'they could to France, and to employ the propereſt means 'of weakening her, which was to interrupt or prevent her 'commerce: that they might ſay, without abſurdity, that 'it was not juſt for Neutrals to enrich themſelves at their 'expence, and, at the ſame time, furniſh France *with the* '*means of continuing the war*; particularly as they allowed 'them to enjoy ſuch commerce as *they had poſſeſſed during* '*peace*, but which they ought not to ſuffer them to augment '*on account of the war*, and to their own prejudice.'

Poſſibly the reader will advert to the very great ſuppo- which, thus far, this great maſter of the Law of Nations gives

gives in these passages, to the reasoning that has been before him. How these passages, at least, can seem to militate against that reasoning it will not be very easy to demonstrate. But he goes on to state, that as commerce and navigation do not depend so much upon general law as particular conventions, it will be necessary to examine them, in order to see whether the English and Dutch have come to a just and reasonable agreement with the Kings of the North. Here, then, he seems to found the right to trade itself upon treaty, certainly, at least, there is nothing here against our positions.

It is the next paragraph, however, which, it is conceived, is hostile, because he says, that if, after all, the Northern Powers can maintain *their* commerce *with* France, by means of convoys of vessels of war, provided they abstain from contraband, no one has a right to question them for it, the laws of humanity and equity not requiring that a people should deprive themselves of any advantage in favour of another, without any necessity for so doing.

Upon this the obvious remark is that, even upon the question of prohibiting all trade, where there is a necessity for so doing, in this very passage it is allowed that it ought to be done; and the only point, therefore, is, to establish a case wherein the necessity may be made to appear. That case it has been the object of the preceding pages to demonstrate, when Neutrals interpose in the carrying trade; an interposition pregnant to the full with as much mischief, and decisive of as much partiality, as the trade of contraband itself; equally, therefore, open to the strong observation in the letter before us;—'But since the greediness of 'merchants is so great, that, for the least gain, they make 'no scruple to overleap *the bounds of justice*, Belligerents 'have a right to search the ships of Neutrals, and, if they 'find prohibited merchandise, to confiscate them as fair 'prize.'

Now

Now, I own, from the whole of the context taken together, I can ſee nothing that would produce conviction, that Puffendorf, ſo far from being the champion of the Neutral pretenſion, is not directly in favour of the Belligerent claim. He allows we have ſeen that the two allied powers may hold, without abſurdity, the very language that we have been holding; he foreſees that many will oppoſe the aſſertions of Groningius, though part of his object was to pull down a pretenſion in that war, which was ſo confeſſedly unjuſt as to be abandoned by the allies themſelves; above all, he allows the neceſſity of checking the unbridled avarice of merchants, whoſe contempt of juſtice, in their eagerneſs for gain, is ſuch, that he gives to Belligerents the full rights of ſearch and confiſcation. This conceſſion alſo immediately ſucceeds the only ſentence in the whole letter, or indeed in all the works of Puffendorf, which glances at any thing like a ſupport of the Neutral claim. But in addition to this, much is to be obſerved upon the terms of that ſentence itſelf. It is by no means unqualified or unmixed; the important ingredient of a *national convoy* is too prominent not to engage our attention; and if this is made neceſſary in the mind of Puffendorf to the enjoyment of the privilege, the whole claim, in the caſe of private ſhips, muſt be abandoned at once.

This, however, could by no means be the intention of ſo true a reaſoner. Convoy may, poſſibly, *if ſo ſettled*, be allowed to diſpenſe with certain forms in the exertion of a right, but can never do away the whole right itſelf. The preſence of a ſhip of the State, it may *be ſettled by agreement*, ſhall *imply* that the veſſels and cargoes under convoy are innoxious; but can never, if they are noxious, render them not ſo; never turn miſchief into harmleſsneſs, crime into innocence. If the right itſelf, therefore, is unſupportable, it is not the circumſtance of convoy that will ſupport it. This is ſo clear, that it muſt make its way into the

moſt obtuſe underſtanding; and we can never ſuppoſe, that the fine mind and learning of Puffendorf could ever intend to broach a poſition ſo replete with abſurdity. If it means any thing as to the maxim we are diſcuſſing, it muſt mean openly and boldly to aſſert, that Neutrals have the right by the law, but, being conteſted to them *by force*, that they may oppoſe that force for the enjoyment of their rights. However, that it cannot mean this, I think is clear, from what has already been cited from the preceding parts of the letter, where the claims of the allied Belligerents are acknowledged in full force. That other conſtruction alluded to, that it applies to points of form, and diſpenſes with ſearch, has, I know, been put upon it; but, meaning to diſcuſs that queſtion in its proper place, I ſhall not entangle the ſubject with it here. One farther, and not unimportant obſervation, however, muſt be made, that, even upon this very point of convoy (whatever it means), the ſentence is conceived in theſe particular terms: that it is to be employed to maintain *their* commerce *with* France; not the *enemy's* commerce, nor *for* France This, coupled with the hiſtorical circumſtance which muſt always be borne in mind, that the allies had, during that very war, pretended to prohibit all trade whatſoever with their enemy, elucidates the myſtery that hangs over the ſubject, and puts the matter beyond all doubt. It proves, I think, that Puffendorf *heſitated* whether even this was not a proper pretenſion of the allies; but that, if the Neutrals, who had a conflicting pretenſion, of perhaps a ſuperior nature, choſe to maintain it by force, he could ſee nothing to prevent its aſſertion. It never can be ſtrained, however, to mean that they had a right to the carrying trade which they had never poſſeſſed before, and which would not be *with*, but *for* France. Now this carrying trade is the very point in diſcuſſion, that free ſhips make free goods; and thus, upon the whole, if Puffendorf's letter is any authority upon the ſub-

ject, it is authority in favour of the Belligerent, not of the Neutral.

And thus we have done with this celebrated letter, the only authority that has ever been even glanced at to prove, that in the seventeenth century the maxim in discussion had ever been laid down as a principle founded in natural right.

What, however, shall we say (if any doubt can yet hang upon this opinion of Puffendorf) to the authorities of two men, nearly his contemporaries, co-ordinate in point of rank and authority as civilians, equal in point of reputation, and who both affirm, in terms the most authoritative and unequivocal, that the pretension is unjust. I speak of no less men than Bynkershoek and Heineccius; the one a Dutchman, the other a Prussian; each of them, therefore, of countries interested in sinking the foundation of the maxim as deeply in the Law of Nature as the Armed Neutrality itself. Each of them, however, determines otherwise.

In the fourteenth chapter of the Quæstiones Juris Publici, Bynkershoek entertains the question, '*De hostium rebus in 'amicorum navibus repertis.*' In this, he says, two things are to be examined: first, Whether the neutral ship itself is confiscable for fault, in carrying enemy's property? next, Whether the property so carried is confiscable? As to the first, after canvassing many doubts, which have before been alluded to, in the writings of Grotius and Loccenius, in times when the law upon the much larger claim of Belligerents was not so well settled as it is now; he decides, as the world now decides, that the ship itself is not confiscable. With respect to the other, his opinion is as clear as his language is emphatic. 'Why,' says he, 'do you doubt, since I have 'a right to seize my enemy's goods wherever I find them?' But there are various treaties between Holland, and France and Spain, in which the contrary rule is allowed; and, therefore, either the old law of France is abandoned, or, '*quod est verius*,' the treaties are exceptions. Whichever

way it is, our buſineſs is more with the reaſon of the thing than with treaties (de ipſa ratione magis quam de pactis laborandum eſt); and, reaſon being conſulted, I ſee nothing to prevent my ſeizingan enemy's property, even on board a neutral ſhip, *by the juſt laws of war*. You will, perhaps, tell me, that I cannot ſeize the goods, without firſt poſſeſſing myſelf of the ſhip; which cannot be, again, without invading her neutrality. But I have a right to ſtop even a neutral veſſel, in order to aſcertain that I am not deceived by falſe colours; I have a right alſo, for the ſame purpoſe, to examine her papers, and the papers relating to the cargo as well as to the ſhip: and if I find that they diſcloſe the property of an enemy, I take poſſeſſion of it by the right of war. This is clearly allowed by the law of Holland, and by the *Conſolato del Mare*. I, however, do not aſſent to the accompanying conceſſion in the *Conſolato*, concerning freight, which, not having been earned, ought not to be allowed.'—Theſe are the ſentiments of a man of the very firſt authority in the law; a man, whoſe admirable ſenſe ſifts the bottom of every thing he examines; a man, in ſhort, whom Barbeyrac ſometimes prefers even to Grotius himſelf.

We muſt not quit this account of Bynkerſhoek's opinion, without remarking upon the ſupport which he gives to the next authority I mean to cite. 'After I had written 'this,' ſays he, 'the book of the illuſtrious Heineccius 'came into my hands, in which he treats upon this ſub-'ject: far from finding in it any thing to make me change 'my opinion, it is rather corroborated, by the authority of 'that great man.'*

Let us now come, then, to the inveſtigation of this authority. It is to be found in that treatiſe of Heineccius which

* Quæſt. Jur. Pub. cap. xv. ad fin.

examines

examines queſtions of confiſcations for carrying prohibited goods.* The eighth ſection treats of preciſely the ſame queſtions with thoſe touched upon by Bynkerſhoek; and after conſidering them pretty nearly in the ſame manner, he comes to the ſame concluſion. It is to be obſerved, however, that although he ſets forth the articles of the *Conſolato del Mare*, which ſeems to have all his approbation, and, conſequently, approves the right of ſeizing enemy's property on board a neutral veſſel; yet he entertains a queſtion upon all thoſe points regarding the confiſcation of the veſſel for carrying it, and the power itſelf of trading at all on the part of the Neutral; which, as we have ſeen, were ſo long undecided in Europe. After mentioning the Conſolato, he obſerves, 'non ſemper tam humanæ ſunt leges 'tempore belli propoſitæ,' and then ſtates a variety of caſes, which all the old civilians had made uſe of before: 'Ex quibus,' ſays he, 'ſatis adparet vere omnino dixiſſe 'Grotium, non certam ea de re eſſe juris gentium legem.'† After diſtinguiſhing, however, ſeveral different caſes, and determining, as we have allowed, that modern ages have moſt juſtly determined, he treats the queſtion before us as if it never had been in doubt: 'Idem ſtatuendum arbitramur, 'ſi res hoſtiles in navibus amicorum reperiantur. Illas capi 'poſſe *nemo dubitat*, quia hoſti in res hoſtis omnia licent, 'eatenus ut eas *ubicunque repertas* ſibi poſſit vindicare.' The ſhip, as has been obſerved, he reſtores to the Neutral, who was not forbidden by any law from taking them on board, in the ſame manner as the Belligerent is allowed by law to ſeize them, when found on board; and he gives the whole common ſenſe of the queſtion in his concluding ſentence: 'Quemadmodum ergo jure ſuo utuntur qui res hoſ-

* De Navil. ob. Vect. Merc. Vetit. Comm.
† Id. Sec. viii.

'tium ex iſtis navibus auferunt; ita et injuſte non faciunt 'qui amicorum res navibus ſuis vehunt.'

For the ſake of the true reaſon, and the real juſtice of the caſe, one could wiſh that the regulation, which was made ſome few years after this, in the ordinances of the French Marine, had been founded on ſuch authorities as the laſt. However, the motive of the King of France was ſtill honourable, when he, for the firſt time, adopted the humanity of the *Conſolato* in relaxing the ancient rule of France. He did this in order, as he ſays in the regulation, 'to preſerve the good faith of the treaties which he had 'entered into,' not on the ground of general equity. Before the regulation, therefore, of 1744 the French Marine had not yet departed from the old *conteſted* Law of Europe reſpecting general trade with Belligerents; and their confining themſelves to the ſeizure of enemy's property alone was matter of lenity and improvement. *

And here we cloſe the account of the authorities upon this debated queſtion, from the eleventh to the middle of the eighteenth century; during which long period, as far as can be judged from the poſitive evidence produced in its favour, and the little force of that evidence which is produced againſt it, the remark which was made in the outſet of this ſection is confirmed, that the ſtream of the authorities is againſt the principle of the Armed Neutrality. I think we are neareſt the truth in ſaying, that thus the matter reſted until the middle of the laſt century, when, for the firſt time, Europe ſaw thoſe principles of trade, which had been for a long time forcing themſelves into practice by the expreſs ſtipulations of treaty, contract, and convention, at length boldly brought forward as a matter of general right, founded, as the Armed Neutrality of 1780

* See the Reglements of 1704 and 1744, 2 Valin, 248, 250.

ſaid,

ſaid, in natural juſtice, and, as the Armed Neutrality of 1800 ſays, in the indiſſoluble ties of natural law. In conſequence of this, it was no longer neceſſary for Maritime States to look to their treaties for the line of their duty, or the foundation of their privileges; but the convenient theory of right ſet up, roſe far above all law; and by ſeeking the divine origin of reaſon, equity, and the general rights of mankind, endeavoured really to perſuade Belligerents, that a Neutral might interfere in the war before their faces, and ſcreen their enemy under his cloak, at the moment when he might be falling within their power.

Theſe privileges, founded on right, were firſt claimed by the King of Pruſſia in the war of 1745, and were developed at large in his miniſter's memorial to the Duke of Newcaſtle, 1752.

That memorial diſcloſed the real pretenſions of the Monarch by whoſe orders it was framed in the ſtyle which it aſſumed;* from which might be collected, in fine, all that the King of Pruſſia found it convenient for himſelf to do, although in defiance of all that any King in the world had attempted in the ſame circumſtances. The Courts of Admiralty in this country having, it ſeems, borne hard upon his ſubjects for bad conduct under their profeſſion of Neutrality, he choſe himſelf to try the matter over again by a Court of his own; and, as might be expected, that Court having diſcovered that his ſubjects were in the right, he proceeded to carry its ſentence into execution, by immediately, and of his own authority, in the manner of repriſals, cancelling the large debt of his new conqueſt of Sileſia to

* Expoſition of the Motives founded upon the *univerſally received Law of Nations*, which have determined the King of Pruſſia, upon the repeated inſtances of his ſubjects trading by ſea, to lay an attachment upon the capital funds which his Majeſty had promiſed to reimburſe to the ſubjects of Great Britain, in virtue of the peace treaties of Breſlau and Dreſden. See 1 Magens, 437.

the merchants of England, until the claims of his own ſubjects were ſatisfied. The mockery of ſetting up a tribunal of his own, to review the ſentence of the only tribunal acknowledged in point of fact by the Cuſtom of Nations, whatever arguments particular perſons may have thought of weight againſt it in theory, it is needleſs to expatiate upon, the queſtion of the competent juriſdiction not being now before us; but in order to ſhew the proper qualifications of this new tribunal, a new law was abſolutely broached, and Europe, for the firſt time, ſaw, in the following abridged queſtions, the embryos of the Armed Neutrality.

I. Whether Belligerent ſhips could ſtop Neutrals on the high ſeas, ſearch, or carry them into port, notwithſtanding, from the exhibition of papers, that no contraband was on board?

II. Whether they could detain them under pretext that they carried enemy's property?

III. Whether the Courts of the capturing Belligerent are competent to decide upon the legality of the capture?

IV. Whether the King could not confiſcate the Sileſian debt by way of reparation for the long delay of juſtice, and the unjuſt deciſions of theſe Courts?

And thus, after near ſix hundred years ſilence in Europe upon this great queſtion as a principle in the Maritime Law, during which time almoſt every other principle had been ſtarted, canvaſſed, reſiſted, or confirmed, amidſt the thouſand revolutions of commercial ſtates; after the very queſtion itſelf had long been agitated with the greateſt urgency as a point of *convention* between particular nations; it was at length fairly put forth in form, as a right belonging to all nations, claimable from nature and not from agreement, and by conſequence ſo far ſuperior in obligation, that treaties on the ſubject were to change their object, and ſtipulate, where change was neceſſary, the *reverſe* of the principle, *inſtead* of the principle itſelf.

England

England ſaw with aſtoniſhment this open and bold deſign to overturn all the received principles of her maritime rights and duties; and prepared to reſiſt them, both by the firmneſs of her conduct and the ſoundneſs of her reaſoning. At that time there were at the Court of London four illuſtrious men, learned in the laws of their country and of the world, of great integrity of life and faithfulneſs in all matters of repreſentation. One of them was a judge of the realm in all matters of civil and public law, the reſt the higheſt law-officers of the Crown. To theſe was confided the important charge of examining the argument by which ſuch unheard of pretenſions were to be ſupported, and to aſcertain whether or not all Europe had been in a dream, when, in compliance with the authority of all her wiſe men, and the example of all her States, ſhe had for ſo many ages admitted the contrary principles as received law.

The anſwer which theſe learned men gave to all the propoſitions laid down by the Pruſſian Miniſter, is ſo well known to England, and ſo widely diſſeminated in Europe, that it is needleſs to repeat it. In this hiſtorical part of the argument, it is ſufficient to ſay, that thoſe excellent perſons, to whom his Majeſty had confided the defence of the maritime rights of his kingdom, moſt amply juſtified the confidence that had been repoſed in them; by furniſhing an anſwer to the Pruſſian allegations of ſuch force and authority, that the maritime law of Europe, for this time at leaſt, ſtood unſhaken. Whether it can ſtand the ſhock of the pens of Hubner and Schlegel, ſupported by the fleets and armies of ſuch great and mighty kingdoms as are preparing for the conteſt, remains to be ſeen. Only thus much we may obſerve; that if the Northern Confederacy ſhould even ſucceed by the force of power to *change* the law, as we ſay it has ſtood for ages, that change will not be brought about by altering the principle, but by a convention not to obſerve it. The nature of the laws of Reaſon and Equity,

Equity, and the writings of thoſe learned men who have developed them, muſt always remain the ſame; whatever injuries they may ſuſtain from ignorance or violence. As a general rule, whenever the ſubject is conſidered in the abſtract, the old opinion muſt ever prevail; and though confederacy ſhould arm after confederacy, and treaty ſhould ſucceed to treaty, until the fact actually happened, that every Maritime State of the world ſhould agree to be bound by a different law; ſtill the rule itſelf, if properly founded, would be impregnable and unaſſailable, whereever firſt principles are concerned. At the time we are treating of, Europe was ſo little prepared to deny this, or, what is more, to deny that the conduct of the preceding ages, and the writings of the Civilians, had been grounded entirely upon theſe firſt principles; that the Duke of Newcaſtle's letter, containing the anſwer to the Pruſſian Miniſter, was then conſidered, and will, I truſt, ever be conſidered by diſpaſſionate and diſintereſted perſons, as a maſterpiece of true and general law. Thus, at leaſt, it was held by the greateſt men of that time. Vattel, in ſpeaking of the juriſdiction of courts in the countries which erect them, obſerves, that for another country to attempt to ſet aſide their definitive ſentence, is to attack the juriſdiction itſelf; on which account no prince ought to interpoſe in the cauſes of his ſubjects when in foreign countries; adding, by way of farther proof, 'la Cour d'Angleterre à 'établi cette maxime avec beaucoup d'évidence à l'occaſion 'des vaiſſeaux Pruſſiens ſaiſis et declarés de bonne priſe pen-'dant la derniere guerre.' And in the note upon this paſſage, he calls it, 'Un excellent morçeau de Droit de 'Gens.'* To this teſtimony of Vattel, we may add, in another country, that of Monteſquieu; who, ſpeaking of it

* Droit des Gen. l. vii. 84.

in

in a private manner, as a mere literary man, in one of his familiar letters, says, it is considered as '*Reponse sans 'replique.*'* There are, however, still stronger and irrefragable proofs of its general merit, its soundness of doctrine, and cogency of conclusion, in the conduct of Frederick II. himself. We have seen that his own minister at the Court of London had abandoned it as far as the principle immediately before us was concerned;† and this probably, together with the force and weight of the answer in the minds of the different public men of Europe, induced him not to renew the subject. Certain it is, that not only these pretensions were never afterwards heard of, as founded in principle, until the Armed Neutrality of 1780; but the king of Prussia gave the most convincing proofs of conviction, by relinquishing the immediate pretensions for which he had directed the Exposition des Motifs to be prepared. The interest of the Silesian loan was no longer withheld, but from that time regularly discharged.‡

After all that has been said, therefore, of the history of the law in Europe; the uniform acknowledgment of the principle of the *Consolato*, whenever it was not modified by treaty; the constant, regular, and strong support which it met with from the writings of Grotius, and the conduct of de Witte; the approbation of all the other writers of the seventeenth century; the unqualified renewal of that approbation by Bynkershoek and Heineccius, at the beginning of the eighteenth; the praise of the answers we have been reviewing, from such men as Vattel and Montesquieu, in the middle of it; and the final acknowledgment of its force by the conduct of the party himself to whom it was addressed: after all this, I say, what are we even to at-

* Lettre 45, à l'Abbé Grafico.
† Andrie's Letter, vid. supr. p. 57.
‡ 12 Smollet, 152.

tempt

tempt to make of ſuch language as this on the part of the Daniſh Profeſſor?

'Le Gouvernement Anglois repondit par une conſultation 'de quatre juriſconſultes qui defendoient les jugemens 'conteſtés par le régle anciennement adoptée par le *Con-* 'ſolato del Mare. On s'etonnait *alors* de ce que le gou- 'vernement et les juriſconſultes Anglois au lieu de ſuivre 'le progrès des lumiéres ſe trouvoient en arriere de plus 'd'un ſiécle dans la ſcience du droit des Gens.'*

What theſe *lumiéres* were, by the progreſs of which we ought to have been governed, it would not be difficult to gueſs; but, unfortunately, the *lumiéres* of that time were all on the ſide of the Belligerent Powers; for in the very next war, not above five years after the Expoſition des Motifs and its anſwer appeared, the ſame principles as were then acted upon by England, were acted upon both by England and France, to the deſtruction of Neutral interpoſition, and with it, perhaps it muſt be owned, in ſome inſtances, to the deſtruction of their juſt rights. The confiſcations of whole fleets, almoſt of Dutchmen, on the part of Great Britain; and of Danes, on the part of France; and the conſequent diſcontent, remonſtrances, and urgent memorials from the merchants to their Governments, are ſtill, perhaps, in the memories of many at this moment alive. Deputation after deputation, in Holland in particular, was ſent to their magiſtracy; and there appeared, at one time, a memorial ſigned by 269 of the principal merchants, ſtating their ſuppoſed grievances and cauſe of complaint; in which, no doubt, many real injuries were interminglied with caſes of reſiſtance to injury. They even went ſo far in this memorial, as to offer themſelves to contribute a contingent, and to arm, at their own charge, for the protection of their inſulted commerce. But, al-

* Schlegel, 9.

though

though great and juſt complaint was made of particular acts of robbery, cruelty, and inſolence, on the part of the Engliſh privateers, for which the memorials of our Ambaſſador himſelf confeſſed there was but too much foundation;* although the defence of our own Belligerent rights carried along with it ſuch frequent attacks upon the fair rights of their neutrality, as to excite the indignation of our own Government, and even of individuals here, who, to their honour, aſſociated to offer rewards for the diſcovery of the perpetrators; although, alſo, there was a great and ſharp conteſt on the interpretation of the Maritime Treaty with Holland; yet, amidſt ſo many opportunities, ſo many direct or incidental occaſions to broach the maxim in queſtion as a matter of natural right, that pretenſion was never aſſerted; but all was reſted upon convention, contract, and cuſtom, and that, not as the conventional or cuſtomary law of Europe, but as the mere poſitive agreement of the two individual States. On the other hand, the Britiſh Miniſter, while, as we have obſerved, he admitted the too frequent inſtances of unjuſt violence on the part of privateers, never once relaxed in the loud aſſertion of our Belligerent claims, to prevent the Dutch from pretending, under falſe interpretations of the treaty, to carry the colonial trade of France. 'His Majeſty,' ſays one of thoſe dignified memorials, 'is at war with the moſt Chriſtian King; he cannot 'hope to get out of it with ſafety, or obtain a ſpeedy and 'laſting peace, which is his Majeſty's ſole aim, if the 'Princes who have declared themſelves neuter, inſtead of 'contenting themſelves with trading as uſual, without any 'riſk, aſſume a right of carrying on that trade with the 'King's enemies, which is not allowed them in times of 'peace. His Majeſty ſees with pleaſure the trade of his

* See Sir Joſeph Yorke's Memor. to the States Gen. 22d Oct. 1758, An. Reg. 1758.

'neighbours

'neighbours flouriſh, and would behold its increaſe with ſa-
'tisfaction, if its proſperity were not repugnant to this
'primary law.'*

In thoſe days, when the ſpirits of men were hotteſt againſt us, there came out at Amſterdam another *Expoſition* upon the ſubject of the diſputes between Holland, as Neutral, and Great Britain, as Belligerent. But, unlike the former Expoſition on the part of Pruſſia, though the cauſes of complaint were preciſely the ſame, ſuch as the interruptions to trade, by unfair detentions, illegal ſentences, and the long delay of juſtice, yet, not one of the objections is founded upon the falſeneſs of the *principle*, as founded in nature, of our conduct as Belligerents; but the whole is confined, either to caſes of improper conduct in the purſuit of an unoppoſed natural principle, or to a diſcuſſion of particular rights under the Maritime Treaty.†

In thoſe days, alſo, came out a *Memoire Inſtructif* on the part of France to Holland, of the precautions which its merchants ought to obſerve, in order to avoid falling within the ſcope of the ordinances of the marine, relative to prize. In the preamble to this memorial it is ſtated, that every power at war is naturally attentive to prevent its enemies from carrying on a free trade under the protection of Neutral colours; and amongſt other things, Article 7th, if Dutch ſhips carry any goods or merchandiſe of the growth or manufacture of the enemies of France, they ſhall be eſteemed good prizes, but the ſhips ſhall be diſcharged. In Article 8th it is ſtated, that the paſſports given in Holland to a Dutch ſhip ſhall ſerve for that voyage for which it is given; that is, to go from the place of its loading to

* See Sir Joſeph Yorke's Memor. to the States Gen. 22d. Oct. 1758. An. Reg. 1758.

† Summary Expoſition of the Caſe of the Dutch Ships, Amſterd. abridged, in the caſe of the Dutch ſhips conſidered by Sir James Marriott, 35 to 47.

that

that of its deſtination, and from thence to return to Holland. If it ſhould make any other *intermediate* voyages with that paſſport, it ſhall be declared a good prize. *

It was in this war alſo that many of the foregoing principles and much of the hiſtorical deduction was drawn up with force and perſpicuity, by the preſent Earl of Liverpool, † in a diſcourſe, which, being in every body's hands, need not here be mentioned more particularly than to ſhew, in conjunction with theſe laſt inſtances, on the parts both of Great Britain and France, how every thing in the diplomatic hiſtory of Europe conſpires to prove the uniform aſſertion, whenever opportunity aroſe for its diſcuſſion, of the principle, *taken as ſuch*, in all times and by all countries. The ſingle exception of Pruſſia, in 1752, to which we have adverted, could never be counted in the ſcale, from the very circumſtance of its being ſingle; but the conduct of that King, which was founded upon the new claim, having, as we have ſeen, been changed, and totally relinquiſhed, the claim itſelf muſt be conſidered as having been relinquiſhed along with it, aud the rule ſtands thus confeſſedly in hiſtory, even without that ſingle and ſolitary exception.

I think we may, with confidence, appeal to the Profeſſor himſelf to point out whether theſe aſſertions are not proved from the hiſtory of the world, from the earlieſt known time to the days of Hubner, or, at leaſt, to the æra of the Expoſition des Motifs; ſince, as has before been adverted to, he himſelf confeſſes, that this was the firſt time that the *rights* of Neutrals were 'completement diſcutés.'‡ But not to confine him to the ſtrictneſs of this confeſſion, we may ſay, I think, without running the hazard of contradiction, that

* Summary Expoſition of the caſe of the Dutch ſhips, Amſterd. abridged, in the caſe of the Dutch ſhips conſidered by Sir James Marriot, 35 to 47.

† Diſcourſe on the Conduct of Great Britain with reſpect to Neutral Nations. ‡ Schlegel, 3

there

there is nothing in his work, at leaſt, which militates againſt our poſition, except ſome very unqualified aſſertions, wholly without proof, and without an attempt at proof; which can only, therefore, be attributed to his not properly diſtinguiſhing the things agreed on, by particular treaties, and the things which all ſtates have a right to claim, and do actually inſiſt on, without any reference to treaty, or even to cuſtom.

That this is not too overſtrained a charge againſt both Schlegel and Hubner may, I think, be collected from the ſenſe which they put upon what they call the *conventional*, or the *poſitive* law of nations. This, throughout their works, is uniformly and invariably applied to the ſtipulations of treaties, which, in every light, appears to me erroneous. For, not to mention that it is ſometimes applied where the caſe can by no means warrant it, ſuppoſing them to be otherwiſe right; I mean where the treaties bear no ſort of proportion to the number of ſtates that obey a different law; the phraſe would ſtill be inaccurate, although by far the greater *number* of the ſtates of the world were to become parties to the treaty.

This may be collected from the forcible import of the phraſe, *Law of Nations*; a term ſo extenſive, ſo abſtract, and of ſuch intrinſic weight, that it implies the duty of all nations, in all times, places, and circumſtances, independent of any change of ſituation, and, conſequently, of the relations of peace and war. By which laſt, we mean not that ſome of thoſe duties may not be *ſuſpended* by the terrible operation of the ſtate of war, but that when peace returns, the law ſhall alſo return of itſelf, by the common courſe and intendment of its inſtitution, and not by the intervention of any new compact, treaty, or agreement.

This character of a law of nations, under what is called the primitive or natural law, is matter of every day's experience; ſince the laws of Nature and Reaſon, which are its foundations

foundations, can never be altered, when left to themſelves, under any change of place or time. But neither do I ſee that this character can in the leaſt be altered, merely becauſe it is conventional; for the force and definition of the term law, *taken as ſuch*, muſt be equally extenſive and preciſe, whatever its foundation or its obligatory powers may be. Once admit, therefore, that it is law, and nothing ſhort of the power which gave it exiſtence is equal to the taſk of its deſtruction: its authority, *while it laſts*, muſt always be equally extenſive, uniform, and certain, and not likely to be affected by adventitious circumſtances, ſpringing from the arbitrary or capricious conduct of one, two, or three of the ſtates that joined originally in its conſtitution. But, above all, it muſt ever continue to bind the *whole* of that ſociety of ſtates which originally ſtipulated to be bound by it; for if it were otherwiſe, I do not ſee how it is poſſible to uſe the term itſelf, of Law of Nations, with any ſort of propriety or accuracy, or, what is more, with any chance of effect in point of argument, or pleading before any tribunal of the Law of Nations. For that law, whether founded in nature and reaſon, or ſimple convention, is that which, emphatically, may be relied on in point of plea, before a court of Law of Nations. It is thoſe courts that are alternately to decide upon claims, and reſiſtance to claims, according to law; and the conventional, once eſtabliſhed, is acknowledged there as of equal force and authority with the natural law. The authority of treaties is alſo there acknowledged between thoſe ſtates that have made them. But how a Britiſh ſubject, for example, where no Britiſh treaty exiſts, can be concluded by thoſe courts, on a point of mere inſtitution, on the ground that Ruſſia, Sweden, and Denmark, in conjunction, we will ſuppoſe, with all the other ſtates of the world, have formed treaties together, it would puzzle the underſtanding to conjecture. In fact, thoſe courts, in queſtions of right, founded upon treaty, look alone to the trea-

ties themſelves for the diſcovery of thoſe rights; but for rights founded in the law itſelf, whether conventional or natural, they look either to natural ſanctions or human inſtitutions. In the firſt caſe, they look to the Law of Nature; in the laſt, they look to the fact; and if the fact is not to be diſcovered, even without the exiſtence of treaties, in univerſality or uniformity, but with great and various exceptions, the law itſelf is wholly at an end. Whenever, therefore, we attempt to ſet up a right, or to repel a claim, upon the ground of *the Law of Nations*, we mean (or we can mean nothing) that there is, in the very force of the term, an authority ſo implicity acknowleged by the party with whom we are reaſoning, that it is not neceſſary to go farther; ſo that the only reply that can be made is, not to deny his obedience to the law, but to queſtion the fact of its being law.

Now, the conventional law of nations, deriving authority from univerſal cuſtom, it is very material indeed that the party reaſoned with ſhould have complied with that cuſtom, or the matter muſt inſtantly drop, as 'res inter alios acta.' It is in this, as we ſay, wholly unlike the primitive Law of Nations, which, as was before obſerved, muſt bind every one, whether he chuſe to deny it or not, becauſe its force, power, and divine authority muſt ever be the ſame; and any attempt to withdraw from it may be rebellion indeed, but never can be an abrogation; the party withdrawing entering into the claſs of common barbarians. But, if what is here called Conventional Law was never ſubmitted to, in point of fact, by *all* the ſtates which, it is ſaid, are its ſubjects; if only part of them have ſumnitted to it; if, beſides, from the courſe of human events, even this univerſal contract (ſuppoſing it to be univerſal) muſt ever be liable to be trenched upon, weakened, and diminiſhed, in the number of its contracting parties; nothing with the force of Law of

Nations

Nations can ever be expected from ſo feeble, fluctuating, and uncertain a ſtate.

Now, to apply theſe principles, we may obſerve, that there are ſome certain cuſtoms agreed upon by all the nations of Europe, and ſpringing out of that ſimilarity of manners, origin, and religion, which characterizes them, or derived from the intimacy and duration of their connections together, which, from being invariably and *univerſally* obſerved, although not the effect of the mere Law of Nature, have come to have the force and authority of law. Theſe, whether they were the ſilent growth of time, the effect of Chriſtianity, or originally the offspring of univerſal compact, are never, or ſcarcely ever, known to change, whatever exigency of affairs may fall out; and theſe, therefore, may very properly be called the Conventional Law. Of this nature are—the right of ſending ordinary or reſident Ambaſſadors to one another's courts, which cannot now be refuſed without an affront; the reſpect ſhewn to flags of truce; the abſtaining from putting priſoners to death, or their reduction to ſlavery; the prohibition of the uſe of poiſoned weapons; the reſpect ſhewn to particular ſigns and ceremonies, ſuch as appear in taking poſſeſſion of newly diſcovered countries; the abſtaining from contraband in war; many of the laws regarding ſalvage and re-captures at ſea; the reſpect ſhewn to an actual blockade, or an order of embargo: all theſe, and others, whether originally the growth of the treaties of *all* nations or not, are, in point of fact, acknowleged by all nations, in all times and places, ſome of them in peace, ſome of them in war, and all of them, whether peace or war, intervene not; ſo that, although war may ſuſpend ſome of them for a time, their authority inſtantly returns on the renewal of peace, without having recourſe to new conventions.

Here, then, is conventional law; but I do not ſee how, in the nature of things, becauſe a proportion only of the

ſtates of Europe (allow it to be a large proportion) have choſen to eſtabliſh certain points of compact together, which are not only not aſſented to, but proteſted againſt, by others, and thoſe points pure matters of agreement, not grounded upon the Law of Nature, but, perhaps, in derogation of that law: I ſay, I do not ſee that the thing agreed upon by theſe compacts can ever aſſume the dignity and power of binding *all* nations, except upon the ſuppoſition that a few, or any number, of independent Sovereigns have a right, by treaties amongſt one another, to bind other Sovereigns equally independent. This, at leaſt, can never be the argument of thoſe who defend the neutral pretenſions; ſince this would be neither more nor leſs than to fall into the very faults of which they accuſe the more powerful Belligerents; and, indeed, for obvious reaſons, can never be defended, either by them, or any other perſons, by any turns of ingenuity, or any force of reaſoning whatſoever; and, therefore, we will not waſte time in the diſcuſſion.

But farther, if even all the States in Europe were to agree to any particular thing by treaty; though the point agreed upon would have as much force, *while the treaty laſted*, as any law whatſoever; yet, according to our principles, that force would not be derived from the law, but the compact. For we muſt always bear in mind, that it is the important circumſtance of being ſuperior to every power, except that which formed it, that forms the very character and eſſence of a law. Law, then, when once eſtabliſhed, muſt exiſt in all times and places, be ſuperior to the adventitious circumſtances of peace and war; and, while it endures, muſt endure with undiminiſhed force, clearneſs, and authority.—This, however, can never be the caſe with matters of treaty, even although the parties to it ſhould be no fewer than all the nations of Europe; becauſe, excluſive of the circumſtance that every member of the compact is himſelf

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the judge of its interpretation, the very nature of treaties is to exiſt no longer than during the continuance of peace and friendſhip between the contracting parties; which words *no longer* do not mean that they revive of themſelves when peace is re-eſtabliſhed, but that, by the very act of war, they are annihilated, not ſuſpended, and can never be renewed, except by ſome formal ſtipulation in the new treaty of peace. Hence, in every treaty of peace, the contracting parties are careful to inſert what of their antient treaties ſhall again be put in force, what modifications they ſhall undergo, what privileges ſhall be preſerved, and what claims aſſerted. But if this is ſo, as the fact of almoſt perpetual war in Europe, among ſome or other of its nations, is too true for contradiction, obſerve how it will affect even that conventional law of nations, as it is called, which, for the ſake of the argument, we ſuppoſe to have been ſolemnly acceded to by *all*. Should *two* nations go to war, the law is inſtantly abrogated *as to them*, and will require a new compact, after war is over, to aſcertain whether it is ſtill the law of *all* nations. Should *more* than two go to war, the breach in the law is ſtill more extended. Should the Belligerents be united by alliances with *many* other nations, (and ſuch is the plan upon which Europe has long proceeded, that it is now ſcarcely poſſible for any two of the principal powers to appeal to the ſword, without drawing along with them almoſt all the reſt,) then this law is for ever at an end, as far as it depends upon itſelf, between all thoſe nations that are ranged on the one ſide, and all thoſe that oppoſe them on the other. But ſhould it happen that ſome of the belligerent nations ſhould change ſides during the courſe of the war, (of the poſſibility of which we have at this moment but too many melancholy proofs) then the abrogation will be extended, not only between the confederates on the one ſide and thoſe on the other,

other, but between thoſe themſelves, who, at firſt, had been ranged under the ſame alliance; in other words, between the very confederates. And thus, if the ſtipulations of treaty can be called the conventional law of Europe, becauſe entered into even by *all* Europe, (a circumſtance abſolutely eſſential to the very term itſelf) there is ſcarcely a year in which new conventions muſt not be made by ſome one nation or other, to aſcertain whether the conventional law is in exiſtence or not.

But where the fact actually is, that only a part of the States of Europe have entered into the treaty; and when the whole hiſtory demonſtrates that many have ever refuſed to form ſuch a treaty; then, beyond all doubt, and upon the mere ſignification of terms, the particular thing ſtipulated for can never acquire the force of a law of nations, for the plain reaſon, that nations have never enacted ſuch a law.

But an objection here meets us, which has cauſed perpetual diſcuſſion whenever the queſtion has been ſtarted, has often divided opinions, and filled the whole ſubject with doubt. As nations, it is ſaid, are all in the ſame ſtate of independence one towards another, and own no ſuperior ſovereign to decide upon their differences, or expound the Law of Nature which governs them; they have had recourſe to the ſtipulations of contract with one another, in order to aſcertain more preciſely what it is that is thus writ down in their duty by the law which they acknowledge. Conſequently, whatever doubts might be entertained before any treaty was made on a particular ſubject, the moment thoſe doubts have been deprived of their uncertainty, by the expreſs proviſions of ſettled compact, the law ſtands diſcloſed in all its truth, may ever after be reaſoned upon, and muſt be obeyed. Hence it is that in treaties we look for the law; and if the majority of nations, or of treaties, have ſettled to purſue or abſtain

abſtain from any particular line of conduct, the interpretation of the law of nations is then reſted upon a ſure foundation: and hence if a conſiderable majority of treaties determines upon any particular point, it inſtantly explains what ought to be the law, and ſhall become the general rule where there is no treaty to meet it with contrary ſtipulations.*

On the other hand, it is ſaid, that ſo far from finding the law in the ſtipulations of convention, thoſe ſtipulations are expreſsly introduced, in order to ſhew that the law in particular inſtances is renounced. In vain, ſays the argument, do you contend for the obſervance or the exiſtence of a Law of Nature, or an univerſal cuſtom, if it is neceſſary to define it by expreſs agreement. Thoſe laws muſt be engraven in the heart of man, or at leaſt be perfectly familiar in the cuſtoms of man; and therefore when we find whole ſocieties entering into compact with one another, concerning any particular path of conduct, it muſt be with a view, in *departing* from what is ſo well known, to point out exactly to what degree it ſhall be abandoned. An agreement therefore to abide by any given mode of conduct, is in direct derogation, not in affirmance of the law, whether conventional or natural.

Perhaps the truth will lie between theſe two oppoſite plans of reaſoning: and probably it will not be very difficult to ſhew that both are in part, neither of them wholly in the right; ſince nothing can be more true than that nations have made treaties both to confirm and derogate from the law; but as long as there is this doubt

* Schlegel, 56. Puis donc que les traités, en vertu deſquels la marchandiſe eſt couverte par la neutralité du pavillon, forme par rapport aux autres une majorité ſi conſiderable, on doit légitémement le envisager comme contenant la réglé générale, et ceux ci ſeulment comme un exception: *d'ou il réſulte que cette régle qui d'ailleurs eſt, comme on l'a vu, fondée ſur le droit des gens naturel doit s'appliquer aux etats avec leſquels il n'exiſte point des traités contraires..*

and

and difficulty concerning them, it ſhews how futile are all allegations that the law is concluſively to be drawn from either, if either is conſidered without proper enquiry into accompanying circumſtances, without modification and without reſerve. Amply therefore does it ſhew with what little reaſon the dry letter of treaties (in whatever number they may be brought forward, either by the one party or the other) is a concluſive indication of the abſtract and intrinſic law. There are two ſorts of treaties, ſays Grotius; one by which we ſtipulate for the obſervance of things ordained by the Law of Nature; the other, by which we add ſomething to that law. As an exemplification of the firſt part of this obſervation, he ſays, that men having quickly forgotten that rule of Natural Law by which they are taught that there is an original relationſhip between them, were found to have recourſe to treaty, in order to obtain the jus hoſpitii, and the jus commercii quatenus iſta ſub jure naturali veniunt.* As an inſtance of the ſecond, amongſt others, he reckons equal treaties of commerce, and of common cauſe in war.† Vattel, after him, purſues the ſame diviſion;‡ and the inſpection of the different proviſions of a variety of treaties in Europe, will prove how difficult it is to collect from the mere circumſtance of making a treaty, whether the parties have renovated and given active vigour to a torpid Law of Nations; or enacted ſomething unknown before, and in addition to that law. This can alone be collected with truth, from a free inveſtigation of the thing itſelf ſtipulated, which thus returns to its abſtract ſtate, wholly independent of treaty, and liable to be canvaſſed preciſely with the ſame free-

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* D. Jur. B. et P. 2, 15, 5, 1, 3. † Id. 2. 15, 6, 1.
‡ Droit des Gens, 2, 12, 169, 172.

dom,

dom, and according to the ſame rules which governed it before it took its ſtation under the claſs of compact.

Of things which exiſted in the Law of Nature before they ever became objects of treaty, and which muſt ever exiſt there, though all treaty was to be annihilated, the following are ſome of the moſt remarkable:—All general ſtipulations of peace and friendſhip, often neceſſary amongſt thoſe nations who formerly thought that where there was no treaty, there was no friendſhip; and in the caſe of ill treatment by the Spaniards in the ſeventeenth century, actually quoted by the Engliſh under Cromwell as their more immediate protection: * all the ſtipulations againſt the entertainment and protection of *pirates*, which form an article of almoſt all the commercial treaties of Europe: all promiſes to deny permiſſion to enemies to fit out hoſtile armaments in the ports of a Neutral,—which fill the maritime treaties from the oldeſt time to the preſent. All conditions alſo, where the ſhips of friends are forced into port by ſtreſs of weather, or the purſuit of pirates, or the enemy, that they ſhall be received with humanity, which form an article in the conventions of the moſt modern times †: in like manner all conditions that they ſhall receive aſſiſtance, and not be plundered while under the misfortunes of ſhipwreck (which one would think would be pointed out by the common feeling of breaſts the moſt obdurate): all ſtipulations when

* Upon the murder of Charles I. the Spaniards treated ſome Engliſh at Malaga with the greateſt hardſhip and indignity, at which the government itſelf was ſuppoſed to connive. The council of ſtate, in their memorial to the Spaniſh ambaſſador, grounded their right to better treatment upon the 1ſt, 6th, and 7th articles of the exiſting treaty with Spain; which ſtipulated nothing more than that they ſhould 'mutually 'ſhew good offices, and abſtain from force and wrong doing.' 1 Thurl. 176.

† See treaty between America and Spain, 20th Oct. 1795.—Debret's State Papers, 40.

merchants

merchants and clerks are admitted into a country as reſidents for the purpoſes of trade, that they ſhall comport themſelves with deference to the laws: ‡ all general engagements, while neuter, not to aſſiſt our enemies with comfort and advice; under which, as we contend, is included a promiſe to abſtain from the carrying trade: theſe, and other proviſions of the like nature, flow immediately from the obvious rules of juſtice, engraven on every man's mind; and ſtanding alone would be ſtrenuouſly ſupported by the courts of law in civilized countries, though they had never been fenced about with the ſanctions of treaty, or were bereft of their ſupport after having enjoyed them.

On the other hand, a vaſt variety of ſtipulations concerning poſitive duty, accoſt us in the peruſal of almoſt every convention in the chanceries of Europe, which no reſearch into the Law of Nature, no ſtudy of conventional inſtitution, could ever of themſelves point out. Such are all commercial regulations within the juriſdiction of the country viſited: the numbers in which foreign ſhips are allowed to enter particular ports; all ceremonies, and partial acknowledgements of ſovereignty, allowed by ſome countries and denied by others: particular ſpecifications of prohibited goods bearing harder upon one country than another: agreements to confiſcate the property of friends on board the ſhips of enemies, which was formerly long objected to, and has now long been allowed: the neceſſity for particular muniments, ſuch as paſſports and bills of lading, in order to aſcertain the property in a ſhip; the mode in which the right of ſearch on the high ſeas ſhall be exerciſed, by three, four, or five of the crew, or more at pleaſure: all ſubſidiary or auxiliary treaties by which a part of its force is furniſhed by one

‡ Treaty between England and Ruſſia, Feb. 1793.

country

country to another, without drawing on a war with that againſt which it is to ſerve. Theſe, and many more, which every man's particular obſervation can almoſt ſupply, may all be conſidered if not in derogation of, yet certainly as not immediately ordained by the law of nations. Many conditions beſides are in the nature of pure compenſations, in order to ſecure as much advantage on the one hand as is parted with on the other; and wherever a price is paid for its allowance, there muſt at once be an end of all argument concerning its intrinſic power as a Law of Nations. And thus we ſee that it is in vain to contend that any one point of the acknowleged duty of nations flows from this or that foundation of its laws, merely from the naked fact that it is provided for by treaty. The only one in which it can fairly be argued that the ſtipulations contained are evidence of the affirmance of the law, is where it is expreſsly ſtated ſo to be. Where nations agree *in terms*, that any general principle they are about to lay down as a guide for the different articles of their compact is a principle of law, and therefore to bind and interpret what they are about to ſtipulate,—ſuch a treaty is very concluſive evidence of what the parties at leaſt thought of the law, although the point itſelf is entirely open to the examination of other parties. And it is in this as in our acts of parliament which are often in affirmance, often in derogation of the common law; but are never evidence in themſelves that they are either the one or the other, unleſs their preamble ſtates them ſo to be. Where nothing is mentioned, the fact remains to be tried by its own intrinſic merits.

The proviſions then of treaty being made both for things evidently taking their foundations in nature; for thoſe which are as evidently of poſitive inſtitution; and for thoſe alſo which may be conſidered as belonging to neither,—

neither,—nothing with precision can be collected concerning them, but every thing must be canvassed, distinct from all its different bearings and relations; and it must stand by itself as if no stipulation had ever been made, no compact framed for its better existence.

These objections to that doctrine which states the engagements contracted by treaty to be the same thing with the conventional Law of Nations itself, appears insuperable to those who wish to conduct themselves with certainty and clearness through the broad field of laws.*

Now all these absurdities, difficulties, and entanglements, may at once be avoided; the whole labyrinth laid open, and every doubt removed by the simple reference of the point to its right and true foundation, the mere transitory authority of agreement between those nations, and those alone, which have contracted together.

With this for our guide, the duty of nations in the

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* Hubner himself, in a variety of passages, is careful to point out that treaties can only bind the particular nations that frame them. Speaking of the treatise of *D'Abreu*, he imputes to it as a fault, that it is confined to the maritime laws of Spain. It is true, says he, that general principles are sometimes sought for, and even treaties sometimes cited; but these are always *Spanish* treaties.* Again, in discussing the cases wherein neutral vessels are not seizable, he says, "An abuse will not make a law; I will not even here examine the articles of different treaties of commerce and navigation, by which some nations *ont renoncé* a une partie de leurs droits—chaque puissance est libre de s'arranger la façon, comme elle le juge apropos mais elle ne doit pas pretendre que ses engagements tiennent lieu loi pour d'autres, ou qu'ils obligent les peuples souverains et independans *qui ne sont pas parties contractantes.*" † Von Senkenberg, as we have seen, does not hesitate to say, that because a considerable majority of treaties have determined upon a point, that point shall become the general rule for those who have made no treaty to grant it; nor does the circumstance of founding the rule in question not at all upon the Law of Nature make any difference, because a necessity for doing so makes no part of his assertion; and indeed would be wholly unnecessary, because a Law of Nature ought to be obeyed, whether confirmed by treaty or not.

* Hub. Pref. 19. † Id. 128, 140, 176, 177.

circum-

circumſtances ſpecified, becomes inſtantly ſimplified, marked, and clear. No claſhing of intereſt, no contrariety of doctrine, no circuitous reaſoning from doubtful cuſtoms, or ambiguous terms, are then ſo likely to ariſe and obſcure the fair line of reciprocal obligation; but every thing is at once referred to the ſhort letter of the contract, which in moſt caſes decides as ſoon as conſulted.

Not ſo at all times is it with the conventional, nor even the Natural Law; but infinitely leſs ſo when an attempt is made to confound treaties with thoſe laws. Amidſt that confuſion, I ſee no rule for courts of juſtice, or their ſuitors to follow; not a gleam of light ariſes to conduct us through the gloom; and then indeed the code of even this civilized age will be liable to the aſperſions thrown by Hubner upon the *conſolato del mare*; in another, 'ce ne ſoit qu'un amas, ou un recueil aſſez mal choiſi, de 'loix maritimes et poſitives et d'ordonnances particulieres 'du moyen age ou des ſiecles peu eclaires.' *

Notwithſtanding theſe obvious and, as it ſhould ſeem, invincible objections, *Hubner* and his countryman *Schlegel* have yet choſen to conſider the Law of Treaties as the Law of Nations, in almoſt uniformly ſtyling it the *conventional* law. In the work of the former, he ſtates the following definition to be an *Idée du droit des gens conventionel*. 'L'aſſemblage des régles obligatoires, *fondées* 'sur les engagemens pris par des états ſoverains, ou par 'leur chefs, et faites pour diriger la conduite réciproque 'des parties contractantes:' † And he explains what is meant by *engagement* in the part introductory to this definition, where he ſays, 'Nous en traiterons maintenant 'ſuivant le droit dens gens ſecondaire et conventionel, ou 'ſelon la teneur des traités de paix, d'amitié d'alliance, de

* La Saiſ. ſur le Nouv. Droit. prelim. † Id. tom. 2. p. 131.

'commerce

'commerce, ou de navigation, qui subsistent entre *plusieurs* 'puissances modernes.'‡ In another part he says, 'Ces en-'gagemens se prennent par le moyen des contrats poli-'tiques qu'on nomme traités conventions ou capitula-'tions;'§ so that the meaning of the definition with which we should not be disposed to quarrel without the explanation, is by that explanation rendered, according to our principles, wholly unsatisfactorily; since nothing seems clearer from the language itself of *plusieurs puissances* and *parties contractantes*; that if treaties are in question, they can only bind those *several* states and those contracting parties.

After all, however, it would perhaps be not of much import, if this confusion of terms was left as it is, open to every man's observation, if all discretion upon the point was not taken away, in a treatise like this, from the use which is everywhere attempted to be made of it. For if we grant the definition with its explanations, as contended for, the supporters of innovation say that they struggle for nothing more than what has long been settled by treaties between a vast number of the states of Europe; and consequently for nothing more than what ought to be considered as the law of Europe.* It is therefore of extreme importance that mankind should not be deceived by an inaccuracy of terms, which, if not stripped of their fallacy, and placed in their true light, may have a dangerous as well as a most important effect on the theory of jurisprudence, on the conduct, and even on the fate of nations. At the same time, however, it is incumbent upon those who dissent from this account of the conventional law, to inquire into the reasonableness itself of what is asserted, (whether law or not) and to ascertain

‡ La Saiss. des B. p. 1[illegible]. § Id. p. [illegible]. * Schlegel 56.

whether

whether it is true, in point of fact, that the principle before us has really been conſecrated as the *general principle* of Europe, as it can be diſcovered in the treaties which have actually been made. This therefore will be the object of the next ſection.

SECTION THIRD.

THE QUESTION AS IT DEPENDS UPON TREATIES.

THE Daniſh civilians, in ſupporting the maxim before us, in addition to ſuch arguments as they have drawn from reaſon, rely mainly upon what they aſſert to be the law of Europe as found in its various conventions. Hubner, for the moſt part, takes up this law within the laſt century; but *Schlegel* extends it to 1642, the commencement aſſigned by *Buſch*, in his Collection of Treaties. At the ſame time, thinking that it would augment the means of the ſupport he meant to give to the queſtion, he brings forward a treaty of our Edward III. with Spain in 1351, and of Charles I. with Portugal in 1642.

The treaties of Europe form ſo vaſt a part of the rule which governs the conduct of each of its ſtates, have ſwelled to ſuch an enormous ſize in point of number, contain ſo many various, and ſometimes ſuch contradictory ſtipulations, and open a field ſo immenſe for diſcuſſion by way of analogy and compariſon, that it is not an eaſy thing to ſettle what general principles may be collected from them, except by a thorough and accurate inſpection of the whole. Why Hubner, in canvaſſing a great principle of law, of the very firſt conſequence to all maritime ſtates, confined himſelf to ſome ſeven or eight, all but the Pyrenean treaty, within the laſt hundred years,

years; or why Schlegel ſhould centent himſelf with the periods adopted by Buſch; can only be explained by the obvious reaſon that ſuch an inſulated number fell in beſt with the object they each had in view; namely, the aſſertion of a particular *aſſumed* point. They argue, as it were, *a priori*; they aſſert a particular propoſition, and of courſe give that ſhape to their enquiries which beſt ſuits what they have aſſerted. Denying as we do the power of any number of treaties taken *per ſe*, to decide upon the law of Europe, or in any degree to influence more than the conduct of the contracting parties; it is of little conſequence to this diſquiſition how the matter may turn out to have been *thus* ſettled. But for the better underſtanding and more perfect knowledge of the real ſtate of the caſe, the inveſtigator would do ill, in an enquiry of this kind to ſtop ſhort at any particular period, or be content while any one commercial treaty remained unexplored which it was at all within the compaſs of his power to examine.

Before we engage however in this enquiry, it will probably be not amiſs to pauſe upon ſuch diplomatic examples as the Daniſh civilians have thought fit to produce; for although the order of our reſearch may thereby be almoſt inverted, and certainly deranged, yet as what was actually determined in thoſe examples demonſtrates that inferences are drawn from them which they will by no means warrant; we collect a circumſtance of no ſmall importance in our inveſtigations, either that our opponents again go beſide the fair queſtion before us, or that their concluſions are all of them falſe in point of argument.

The firſt treaty mentioned by Hubner, is that between France and Denmark, 23d Auguſt 1743, and is honoured with all his praiſes. It is compoſed, he ſays, in a ſpirit which

which redounds not more to the juſtice than the intelligence of the contracting powers. It aſſerts and confirms, in a manner the moſt poſitive, that great general maxim of natural law upon the ſubject of neutral navigation and commerce; that it ought to remain upon the ſame footing as in time of peace, *without any other modification than that which ariſes from the nature of neutrality itſelf.**

There is therefore at leaſt ſome modification by his own ſhewing; and that by no means unimportant in its kind, being neither more nor leſs than what will make the whole difference; namely, that which does ariſe from the nature of neutrality. If it is the nature of ſuch a ſtate not to interfere in war; not to ſupply men to belligerent traders, in the place of thoſe who fight in belligerent fleets; the queſtion is already determined between us. The liberty of commerce therefore, *as thus ſtated*, is palpably nothing more than that liberty which, as we have ſhewn in preceding parts of this work, was in older times denied without the intervention of treaty: that liberty alſo which half the exiſting conventions of Europe denied in the very moment when the treaty in queſtion was framed, in all thoſe articles which ſpecified that though free ſhips might make free goods, yet that goods of neutrals found on board the ſhips of enemies, ſhould be confiſcated along with the ſhips as prize ‡. If this however was even not ſo; what, under his favorite ſtipulation, 'that trade ſhould be free as in time of peace,' becomes of the right to the colonial carrying trade, which had never been enjoyed during peace: yet this is equally an object of neutral

* Hub. tom. 2. p. 139.

‡ See the exiſting treaties. 'where free ſhips, free goods' is ſtipulated; for the one always follows the other.

claim if the Belligerent will conſent to it, though only to uſe his own expreſſion, pendaut la guerre, et a cauſe de la guerre. †

Upon the inſpection of the treaty, even in the articles which Hubner has furniſhed, we find that all it ſtates in favour of neutrality, is the power of ſailing at will from their own or neutral ports to the ports of the enemy of either, and from enemies ports to enemies ports, without trouble or hindrance, in the ſame manner as before the war. Blocked up ports are defined to be thoſe which cannot be entered without manifeſt danger; and it is provided, as it had before been provided by almoſt all commercial treaties for an hundred years, that no men or ſhips ſhould be forced under an embargo to take part in the war againſt their will. At the ſame time it is remarkable, that not a ſyllable is ſaid of free ſhips making free goods, the point in diſpute, although the example of all ſurrounding ſtates ſhewed the neceſſity of noticing it as an article of treaty whenever deſired by the contracting parties.

There is nothing therefore in this boaſted treaty ſo honourable to the juſtice and the intelligence of thoſe who formed it, and ſo ample an illuſtration of the true Law of Nations with regard to commerce,* which would not almoſt be granted by every commercial treaty. If we except the words 'trading as in times of peace,' it was very little different from the treaty then actually exiſting between Denmark and ourſelves; which eſpecially provided that the parties might trade with the enemy in time of war. Yet that trade, as might be ſhewn from other parts of the treaty, was not meant to extend to the right of carrying

† See page 14.

* Céſt ainſi qu'on decident le droit des gens univerſel et le xxme article du traite, &c. &c. Hub. 2. 139.

enemies

enemies goods: † a right which, according to our principles, was always excluded by the generally received and acknowleged duties of neutrality.

have been the longer in this examination, becauſe it ſeems to be the treaty moſt ſtrenuouſly relied upon by *Hubner* as a pattern of all that he wiſhes. But as nothing is ſaid of the carrying trade at all, and (whether to exerciſe or to abſtain from that trade be a natural right or not) as it is notorious and beyond all contradiction that, where nothing was ſtipulated in terms concerning it, the nations, in point of fact, always did confiſcate enemy's property; we are at a loſs to diſcover what ſpecific point is meant to be proved by it. *Hubner* muſt therefore either have cited this treaty, as a proof merely that a trading with the enemy is a natural right, without at all meaning to contend for the other; or if he did contend for the laſt, he leaves a cloud of doubt and miſrepreſentation upon the authority he cites, and his mode of argument from *caſes*, is at leaſt not convincing.

The ſecond treaty cited by Hubner, is that between Denmark and the Two Sicilies, April 1748, which he ſays, not only eſtabliſhes the ſame liberty with the laſt, but adds a clauſe *ſtill more advantageous to* that liberty. * This article is neither more nor leſs than a very common one in the treaties of that time, and the times preceding, which frequently gave liberty to one of the contracting parties to continue its trade with the enemies of the other. The words are, 'Leur apporter, ſans aucun empêche-'ment, toutes ſortes de marchandiſes, à l'exception de 'celles qui ſont de contrebande: a moins que ce ne ſoit

† See the treaty 1670. 13 Corps Dip. 132, particularly articles 15 and 20.

* Hub. 2, 144.

'dans une ville, port ou endroit affiégé; auquel cas il leur 'ſera libre toutefois de vendre leurs marchandiſes aux 'affiégéans, ou de les aller vendre & porter en quelque 'autre ville, port ou endroit qui n'eſt pas affiégé.'

It happens alſo peculiarly, that this article, which adds, it is ſaid, a clauſe ſo advantageous to the liberty of commerce, is, word for word, the ſame with the 16th article of the treaty 1670, which was laſt cited as exiſting between England and Denmark itſelf. Yet that treaty, as has been obſerved, prohibited the parties from carrying enemy's property; not indeed by an expreſs and independent ſtipulation, but in a manner infinitely ſtronger in favour of the argument, by a forcible reference and plain mention of the point as the known exiſting law. The 20th article provides for paſſports, and is as follows: 'But leſt ſuch freedom of navigation or paſſage of the 'one ally and his ſubjects and people, during the war, 'that the other may have by ſea or land with any other 'country, may be to the prejudice of the other ally; *and* '*that goods and merchandiſe belonging to the enemy may not* '*be fraudulently concealed under colour of being in amity*; for 'the preventing of fraud, and clearing all ſuſpicion, it is 'thought fit that the ſhips, goods, and men, belonging to 'the other confederate, in their paſſage and voyages, be 'accompanied with letters of paſſport and certificate; the 'forms whereof to be as follows:'

The paſſport itſelf contains the neceſſary aſſertion, that the cargo really belongs to 'the ſubjects of Den-'mark, *or to others in neutrality*:' and thus the carriage of enemies property is not only prohibited by this treaty, but is prohibited in a manner which evinces that the contracting parties proceeded upon it as upon the known and acknowledged law.* But if this is ſo, no argu-

* See the treaty with Denmark, 1670. Corps Diplom. 13, 132.

ment

ment whatſoever, in favour of the poſition in queſtion, can be drawn from the treaty with Denmark, cited by *Hubner*. Since though it contains an article very favourable to commerce, that article is contained alſo, word for word, by a treaty, which plainly diſallows and repels the poſition.

The ſame remarks are of courſe applicable to the next example, relied upon by Hubner (the treaty between Denmark and Genoa in March 1756) ſince he cites it as containing preciſely the ſame proviſions. Thus much however may be added, that from the date of the treaty, it appears to have been made in the very heat of that war, and in the very capital of France, in which the Danes complained loudeſt of the invaſion of their neutrality by France. Perhaps it was made at the moment when Hubner himſelf, the delegated aſſertor of Daniſh neutral claims, was at Paris, on the ſpot: it is ſtrange, therefore, if the principle of free ſhips making free goods, was even at that time ever claimed as a neutral right, that treaties, which he cites as models of the liberty of commerce under the natural right, ſhould not have contained an expreſs proviſion to protect it from invaſion.

His next authority is the great Pyrenean treaty between France and Spain. In vain however is it examined, in any thing which he cites of it, for the allowance of the maxim. Much indeed is to be found in ſupport of the general freedom of trade, which, ſubject to proper exceptions, has all along been allowed; we find ſtipulations that ſhips and men ſhall not be preſſed into the ſervice of belligerents; that the ſubjects on both ſides ſhall have free liberty of navigating to all ports friendly to themſelves, though hoſtile to the other party; and that they ſhall not be troubled or hindered on account of the

war; but no notice is taken whatſoever, in the parts cited by Hubner, of the claim or ſuppoſed right to carry enemy's property. As far therefore as depends upon him, though the fact is otherwiſe, nothing can be collected from this treaty in affirmance of the maxim.

The next treaty relied upon by Hubner, is that between France and the Hanſe Towns, Sept. 1716: and his reaſoning upon it is as little concluſive as it is ſtrange that he ſhould have cited it at all. The 8th article provides, that no ſhips or men ſhall be preſſed into the ſervice of France when belligerent; and the 13th, that they ſhall not be ſtopped nor detained, except they are laden with contraband, *or the goods of enemies*. This laſt clauſe is ſo fatal to his object, that he is obliged to add, that it is purely poſitive, and therefore mere matter of convention: but why, in a part of his work which aſſerts the treaties of Europe to be themſelves its conventional law, and which propoſes to enquire what that law is, as it is found exiſting in treaties, he ſhould explain away the very treaty which he cites, as being mere matter of convention (the point itſelf about which he is enquiring) I own myſelf wholly at a loſs to diſcover. At the ſame time, whatever is his purpoſe, he is peculiarly unfortunate in his ſelection, becauſe the national law of France, one of the contracting parties, proves that the exception *could not be* as it is called, was only in conſonance with its received and fundamental principles concerning neutrals; and therefore that it could not be mere matter of convention. That law, when not changed by treaty, from the time of Francis I. confiſcated all enemy's property found on board Neutrals; ſometimes with the Neutral veſſel itſelf, ſometimes relaxing that latter rule, but always, in all the royal ordinances, confiſcating the property.

In

In 1704 in particular, only two years before the treaty in queſtion, it was ſtrenuouſly and generally renewed and enforced in all its ancient ſtrictneſs; the ordinance of that year confiſcating the neutral veſſel itſelf for carrying enemy's property, and even for trading with the enemy's ports. Nor was this ordinance at all relaxed for the ſpace of forty years; and then only in favour of thoſe countries, with which contrary ſtipulations had been made, and expreſſly on account of thoſe contrary ſtipulations. The ordinance of 1744 approves that of 1704, in the abſtract, in the moſt unqualified manner; and only abrogates thoſe parts of it which are incompatible with treaties. * Hence it amounts to a demonſtration, that the enforcement of the old law of France, and in particular of the ordinance of 1704, by a treaty in 1706, could never be deemed a poſitive exception to the general rule, or purely matter of convention.

That Sweden ſhould make a treaty with France in 1741, reſerving, as he ſtates in his next example, all thoſe parts of the laſt mentioned compact which were advantageous to navigation, but rejecting all the burthens, is neither ſurpriſing, nor any thing to the purpoſe; unleſs (what he does not aſſert) ſhe introduced an expreſs principle, flowing from the Law of Nature, and militating againſt the conditions from which ſhe was to be exempt. That ſhe did this however, as he inſinuates, becauſe ſuch conditions '*n'iroient pas à une puiſſance qui tient un rang 'diſtingue parmi les nations modernes*,' is what no perſon will aſſent to who is at all acquainted with its hiſtory. The ſpirited Chriſtina, in the ardour of her mind, at leaſt

* See the Reglements of 1704 and 1744, 2 vol. 248, 250.

worthy of being the daughter of the great Adolphus; or the active, the vigorous, and politic Charles Guſtavus, were as prompt to ſee, and as bold to aſſert, what became the rank and dignity of their nation, as the yielding Ulrica, or the foreign Frederick I.: nor was the nation itſelf, when it had juſt influenced the fate of Germany the conqueror of the Pole, the Dane, and the Muſcovite leſs powerful or elevated in the rank of ſovereigns, than when beaten and even cruſhed by the aſcendency of the latter. Yet ſuch is the ſort of fatality which attends *Hubner*'s obſervations, that in the former period, and under thoſe high minded ſovereigns, Sweden yielded (if to acquieſce in the law can ever be called yielding) that very point to England in the ſeventeenth century, which ſhe was *too elevated in rank* to yield to France in the middle of the eighteenth. *

The laſt example cited by *Hubner*, is the treaty of Vienna, 1721, between the Emperor and Spain; and the articles regarding Neutrals being conceived in the preciſe terms of thoſe of the firſt treaty, mentioned between Denmark and France, are open to all the obſervations there made: nor can we too often attend to this important conſideration; that, while it is known that the great maritime powers have univerſally and uniformly claimed a right to confiſcate enemy's property found on board Neutrals, when there is no treaty to the contrary;—and more particularly, when many countries have made treaties to the contrary, to ſerve eſpecial intereſts; all *general* ſtipulations of a right to navigate freely and

* By the treaty of Upſal, under Chriſtina; and of Whitehall, under Charles XI, precautions were ſtipulated *to prevent the fraudulent concealment of enemy's property.* 2 Chalmers, 34 and 53.

without

without interruption, or to trade as was permitted before the war, can only be referred to as a general rule, ſubject of courſe to the proper exceptions:—at moſt, can only be referred to that great diſpute, which once, as we have often obſerved, divided Europe upon the claim of Belligerent powers, to inhibit all commerce whatſoever between Neutrals and their antagoniſts.

Such then, and in ſo ſmall a number are the treaties on which the Daniſh civilian relies, in order to prove that what he thus calls the Conventional Law of Europe, has determined for the freedom of navigation and commerce to ſo vaſt and unlimited an extent, that every ſort of traffic is to be permitted to Neutrals without exception; and of courſe, as his commentators explain him, the carrying trade along with the reſt.

We have already made it a queſtion, whether any number of treaties can amount to a law of nations; but we may with ſtill greater propriety, be permitted to doubt whether ſeven or eight treaties, entered into altogether by but ſix of the powers of Europe, and that within the ſpace of fifty years, can decide upon what is Europe's law upon ſo important a point. With yet greater reaſon may we doubt whether the treaties themſelves, as brought to our obſervation, furniſh any thing like evidence of the opinion that was entertained of the principle before us, even by thoſe who framed thoſe treaties. One of them, as we had occaſion to obſerve, contained ſtipulations directly in the teeth of the poſitions of him who brought it forward: and all of them are made up of very general proviſions, amounting to ſuch an indefiniteneſs of privilege, that, if conſtrued literally, it is known that they are denied by the contracting parties themſelves. Of this the generally ſtrict

ſtrict reſerve of the colonial trade, and the proviſions of the Daniſh treaty with England, laſt cited,* notwithſtanding the ſame ſort of indefinite and large ſenſe which might be put upon its letter, are eminent and concluſive inſtances. Leave we then ſuch inſulated, garbled, and feeble examples of the ſort of law which is ſet up, to produce what effect they may upon minds of any ſize or inquiry; and let us turn to the Daniſh work of the preſent day, which endeavours with greater vehemence, and perhaps greater powers, to ſupport the maxim under what its author alſo calls the conventional law of nations; but what, according to our principles, is the mere ſtipulation of particular compacts.

Profeſſor Schlegel, however, has not given us very detailed means of enquiry; ſince, although there is a pretty large aſſertion with reſpect to the number of treaties which Buſch has collected, amounting to thirty-five, and all of them, as it is ſaid, favourable to the principle of *free ſhips free goods*, Schlegel himſelf has mentioned but nine, even in figures, which ſupported the principle previous to the armed neutrality of 1780. At the ſame time, he ſays, he recollects but two which gives into the contrary practice; namely, thoſe of England with Denmark and Sweden, in 1661 and 1670. Yet, as we learn from Hubner's own enumeration, and in complete derogation of the principle which it was cited to ſupport, there is at leaſt one other that may be claſſed along with them; I mean that of France with the Hanſe Towns in 1706; and the very treaty with Sweden was founded upon two others which had preceded it, in the time of Cromwell. Leaving this however as one of thoſe almoſt

* Page 102.

inevitable

inevitable omiſſions into which the beſt memories, particularly when the judgment is under the bias of a favourite object may fall, let us come to the conſideration of thoſe which Schlegel himſelf has actually enumerated; and firſt of the treaty of 1351, between our third Edward and the king of Caſtile.

Although this is quoted as full to the point before us concerning the rights of the neutral flag, yet I own I have looked with attention, and looked in vain for the diſcovery of any thing in ſupport of the poſition. I ſee indeed a ſtipulation, ſuch as is to be found in every treaty of commerce, even in thoſe the moſt ſevere againſt neutral claims, that the ſubjects of the two countries may ſafely paſs and repaſs with their merchandize of whatſoever country, and to whomſoever belonging, both by ſea and by land;* but no mention is made here of a ſtate of war between one of the parties and a third; and, being a ſimple article of the truce between the two ſtates, it cannot by poſſibility be tortured to mean that enemy's property may be covered by the neutral flag within the very ports of the belligerent. I ſee alſo in another article, that if the king of England or his ſubjects ſhall happen to gain a town or caſtle from his enemy, wherein any ſhips, merchandize, or other property belonging to the ſubjects of the king of Caſtile ſhall be found; then the king of England, or he who is captain for him, ſhall, with all the loyalty in his power, and upon the faith of the ſaid truce, reſtore thoſe ſhips, merchandize, and property to the ſubjects of the kingdom of Caſtile, oath being made qu'ils ne ſoient armez ad les enemys le dit roi d'Engleterre et de France, ne face a eux eide ſocour ne comfort.†

* 5 Rym. Fœd. 718. † 5 Ibid. 710.

Theſe

Thefe are all the paſſages of that treaty which apply to the ſubject in diſcuſſion; and very far indeed are they from going the length of proving, becauſe the goods of friends found within the juriſdiction of enemies are to be reſtored, on oath that their owners had given no ſuccour to the enemy, that the converſe of that poſition is true, and that the goods of enemies within the power of friends are alſo to be reſtored. What was here determined, is in truth in the very ſpirit of one of the articles of the *Conſolato* which has been placed before the reader; yet, ſtrange to ſay, with what preciſe ideas I know not, Schlegel, in introducing this treaty of Edward III, accompanies it with a kind of ſurpriſe, that it was deja vers le milieu du 14me ſiecle, *et lorſque le Conſolato del mare etoit la ſeule loi en vigueur.* † The next treaty mentioned by Schlegel, is that between Charles I. and Portugal, 1642, renewed by Cromwell, 1654: an interval from the treaty with Caſtile of full three centuries. The reaſon for this amazing chaſm, it would not be unnatural to aſk, more eſpecially as the firſt treaty was mentioned, becauſe it is ſuppoſed to furniſh ſupport to the object in view. Had the Profeſſor confeſſed at once, that all the treaties with England until 1642, were againſt his principle, and then challenged its fairneſs and foundation in nature, from the circumſtance alleged, that all from that time are in its favour, we ſhould then know exactly the point about which we are at iſſue. But the mention of any treaty at all previous to that time, becauſe ſuppoſed (with what accuracy we have ſeen) to bear upon the queſtion in his favour, gives us a fair right not only to examine the treaties adverted to, but alſo all other contemporary conventions, and even all thoſe that

† Schlegel 57.

ſuit

fill the interval. The juſtice of his own auguſt ſovereign, and of that other monarch, the cauſe of whoſe ſhips he has come forward to plead, muſt allow this; becauſe otherwiſe, as there is a poſitive aſſertion of the prevalency of the principle from 1642, and a poſitive (though, as we have ſeen, moſt miſtaken) aſſertion of its exiſtence in 1351, it might otherwiſe be ſuppoſed that the principle as laid down, had actually exiſted during all the interval, in the ſame unoppoſed vigour and extent of acquieſcence. Before we inquire, however, into the hiſtory of treaties from the middle of the fourteenth century, it may not be improper to aſcertain what actually was decided in thoſe treaties of Charles I. and Cromwell with Portugal; and I own, from the beſt attention I am able to give them, I am wholly at a loſs to diſcover any thing to warrant the aſſertion that they are conformable to the principle of free ſhips making free goods.* The 10th article of the treaty 1642, ſtipulates, (as in many others that have been mentioned) that ſhips and ſubjects ſhall not be preſſed in war; the juſtice of which we nowhere deny: yet even that article allows that goods may be taken for the ſervice of the king of Portugal, upon payment, within two months of the current and reaſonable price. The eleventh article gives general permiſſion to the ſubjects of Great Britain to ſail to the ports of Spain, there to exerciſe traffic and commerce: however, it ſays not a word of being allowed to carry Spaniſh property (there being then war between Spain and Portugal); and what is actually ſtipulated, if it determines any thing, determines againſt the full freedom of neutral commerce, when it prohibits the Engliſh from carrying any merchandize direct from the ports of Portugal to thoſe of Spain.† Thoſe who contend for the unlimited

* Schlegel 56, 57. † Du Mont Corps Dip. II, 238.

right

right of trading upon the ſame footing as in times of peace, and who cite ſuch treaties as theſe in ſupport of that doctrine as a point of the conventional law of nations, muſt reconcile this incompatibility if they can.

From what has been remarked, and the curſory examination we have given to the very authorities which our opponents in the argument have adduced, little more perhaps might be thought neceſſary on the ſubject. It is quite ſufficient, it may be ſaid, to have beaten down the authority of every ſingle caſe, and every treaty which has been brought forward, and to have ſhown how little warrantable are all the deductions that have been drawn from them. There are in truth, however, a great number of treaties which actually do contain ſtipulations in favour of the principle, more eſpecially in latter times; and they have multiplied greatly ſince the armed neutrality of 1780, though interſected with many exceptions in point of fact, and many incongruities of conduct. But as an acceſſion to them has been uniformly refuſed by this country, which has ſcarce ever departed from what it calls the authority of the natural law on the ſubject, ſupported by uſage where there are no treaties; as ſtrange miſconceptions of that uſage, have crept into the works of civilians, reſpectable we ſee as thoſe which we have been examining; a ſome diſcrimination is neceſſary in drawing proper inferences from the vaſt body of commercial treaties that exiſt, ariſing from the general ſtate of the laws of commerce at different times, the different relations and connections of princes, and the variety of character, and views in public men; and as beſides it muſt ever be an important object in a treatiſe of this kind, to give ſome clue to a matter ſo apparently entangled,—it will perhaps be right to ſet before the reader, as far at leaſt as lies within the compaſs of very confined powers, how the matter ſtands in the treaties of the laſt four hundred years.

As

As it is acknowledged by Schlegel himself, that the *Conſolato del Mare* was the ſole law in vigour in the fourteenth century;* and that, during that period and the fifteenth, almoſt all the treaties were formed upon its principles;† we have a very important datum granted to us, with reſpect to the earlier conventions; ſince nothing is more inconteſtible, than that enemy's property, on board neutral veſſels, was by that law confiſcable. Bearing this in our minds as the received, acknowledged, and univerſal regulation, where no agreement was made to the contrary, we may, notwithſtanding, find ſome treaties which do make ſtipulations to the contrary; we actually find ſome, which expreſsly confirm it: and many more which make no mention of it at all, and the uſe which I make of this acknowledgment of Schlegel, and indeed without ſuch acknowledgment, of the known authority of the Conſolato, is to eſtabliſh three propoſitions of ſome importance in this diplomatic reſearch. I. That, where the rule of the Conſolato is departed from in a treaty, it is an *exception* to the law.—II. Where it is ſupported by an expreſs article, it is merely affirmatory; and, III. Where it is not mentioned at all, it muſt be taken for granted, that it was ſtill always acknowleged. Theſe propoſitions are an inevitable conſequence of the mere allowance, that the law was acknowleged in point of fact; and is as ſimply concluſive, as that the municipal law of a country governs its inhabitants when not referred to in the ſpecial compacts they make together, although they may ſometimes tie up the law by thoſe compacts, and ſometimes give it additional vigour and effect.

Now of fourteen treaties of commerce, which are to be found (doubtleſs amongſt many more, but which I have had no opportunity of ſeeing) during the fifteenth century,

* Schleg. 5. † Id. 4. Dans les 14me. et 15me. Siecles preſque toutes les traites furent faits d'après ce principe.

but

but three make any mention of the caſe of enemy's property on board neutral veſſels. Theſe are the treaties of England and Genoa in 1460, England and Flanders in 1478, and another between the ſame Powers in 1495; and all three ſupport the rule of the *Conſolato*. The firſt of them was probably meant to correct the indefiniteneſs with which another treaty, between England and Genoa, had, upwards of thirty years before, permitted the general rights of trading with belligerents. By one of the articles of that treaty, (in 1421) it is ſtipulated, that in caſe of war between one of the contracting parties and a third, the other ſhall be bound to take no ſhare in it; at the ſame time it is ſtipulated, that their ſhips and merchants, with their goods and merchandize, may ſafely paſs and repaſs to and from the ports of the other belligerent, and there exercise their trade at large, without danger of an infraction of the peace.* Upon a renewal of the alliance, between the two countries in 1460, this probably had been found too large a grant of liberty, conſiſtent with the fair means of defence; and it was then ſtipulated, that no aſſiſtance or favour ſhould be ſhewn in any manner, direct or indirect, and that, in particular, they ſhould not carry the goods of enemies in their ſhips. The regulations, concerning this matter, are clear and deciſive; and indicate ſo preciſely what was then, at leaſt, thought of the duty of Neutrals when met on the ſeas, in order to avoid contributing to the aſſiſtance of a belligerent, and what was to be the penalty of a reſiſtance to that duty; that I will ſtate the paſſages at length for the exerciſe of every man's judgment.

Item quod non liceat de Guerram nobis aut ſubditis noſtris moventi aut moventibus, auxilium favorem vel juvamen concedere, dare, vel exhibere quocumque modo,

* Rymer's Fœd. an. 1421.

vel

vel dato colore, clam vel palam, directè vel indirecte dicto tempore durante.

Nec cariabunt aut portabunt in navigiis eorum ſupradictis; bona aut mercemonia alicujus inimici noſtri ſeu inimicorum noſtrorum; et, caſu quo fecerint, petiti et interrogati per noſtros, *dicti Januenſes* debent (immediatè et ſine dilatione, mediante juramento ſuo, cui ſubditi noſtri fidem dabunt) veritatem dicere et fateri, quæ et qualia bona inimicorum noſtrorum vel inimici ducunt in navibus ſuis, et illa ſine difficultate tradere et deliberare capitaneis, vel ducentibus navigia noſtra pro cuſtodia maris, vel aliis ſubditis noſtris quos obviare contigeret navibus dictorum Januenſium, ubicumque ſuper mare, recipiendo pro rata nauli ſive affrectamenti hujuſmodi mercium inimicorum. Et, caſu quo *dicti Januenſis* ſic facere recuſaverint, vel juvamen aut defenſionem preſtiterint alicui inimicorum noſtrorum, contra ſubditos noſtros ſuper mare; *licitum erit ipſis noſtris ſubditis eoſdem Januenſes invadere et depugnare eorum naves, et bona capere et retinere, perſonaſque eorumdem priſonarios accipere et cuſtodire.* *

From theſe articles, we ſee that two very important points, between neutrals and belligerents, were reſolved on in the fifteenth century by two of the greateſt maritime ſtates of Europe; (for who ſhall ſay that the *proud Genoa* was not a very great maritime ſtate at that time?) Theſe points were, that the belligerent, meeting the neutral upon the ſeas, had a right to enquire, in order for confiſcation, after any enemy's property which the latter might carry; that the neutral was bound to ſpecify the property on oath, which, if he refuſed to do, or ſpecified falſely, (for ſo in this place may be tranſlated *juvamen* aut defenſionem preſtiterint,) it was lawful for the belligerent to ſeize his ſhip and goods, and detain the perſons of his men as pri-

* Rymer's Fœd. ii. 441. 442.

soners. Not vastly different from this, but greatly more in favour of the neutral, is that old and regularly asserted law which has lately been so much questioned; by which *resistance* to the same right of examination is made also to call down the confiscation of the ship resisting.

The first of the other two treaties that have been mentioned, contains similar stipulations, though not in such detailed and precise terms. It is in 1478, between Edward IV. and Maximilian, and states, that the merchants and masters of ships belonging to Flanders—" non adducent aut adduci facient per mare, fraudulose vel quocunque colore, aliqua bona seu mercandisas inimicorum Angliæ, Hiberniæ vel Calesiæ; et de hoc, quoties cunque per subditos Angliæ Guerræ operam dantes fuerint interrogati, tenebuntur facere justam et veram confessionem et declarationem.*

The remaining treaty, containing an express provision in support of the principle, is that between our Henry VII. and Philip, Duke of Austria, in 1495, and is a little more full than the last, and more particular than the first, which has been mentioned, between England and Genoa. The xxiiid. article is as follows.—Item, conventum est ut supra: quod subditi unius principum prædictorum, sive mercatores fuerint, sive nautæ, magistri navium aut marinarii, non adducent, seu adduci facient per mare fraudulosè, vel quorumcunque colore, aliqua bona seu mercandisas inimicorum alterius eorundem principum: et si secus egerint, et per subditos alterius principis guerræ licitè operam dantes super hoc interrogati fuerint, tenebuntur facere veram, planam et justam confessionem et declarationem, cui in ea parte protunc stabitur, iidemque interrogantes ulterius scrutamen in ea parte non facient. Sed si postea eundem interrogatum falsò respondisse con-

* Du Mont Corps Dipl. [illegible]

stiterit,

ſtiterit, tunc idem interrogatus interroganti, quem per falſam reſponſionem defraudavit, tantum de ſuo erogare tenebitur, quantum merces inimicorum per eum vectas, et ut præmittitur, celatas, valuiſſe conſtabit.*

In addition to theſe four, there are ten other treaties of a commercial nature, between the maritime ſtates of Europe, during the fifteenth century, which ſtipulate, generally, both for freedom of trade and for perfect neutrality, but which do not mention the principle before us, in expreſs terms. Such are the treaties between England and France, 1475;† England and Riga, 1498;‡ England and Flanders, 1499;§ France and Venice, 1477;‖ France and Portugal, 1485;§§ France, England, Venice, and Florence, 1492;‖‖ France and Venice, 1498;‡‡ France and England, 1497;†† France and Denmark, 1456;** and France and Spain, 1500.††

Theſe treaties do not mention the principle, in terms, and are, therefore, according to the propoſitions laid down, ſuppoſed to be built upon it, as the known and acknowledged law of Europe, operating ſilently, indeed, but with not leſs effect, than if expreſsly mentioned in affirmance of the *Conſolato*. In the three treaties which entertain the principle, in terms, we ſee freſh ſupport brought to it, in the moſt poſitive manner; and its rigour, ſo far from being relaxed, is extended, corroborated and aſſerted, by the introduction of heavy penalties for the now criminal attempt at fraud or reſiſtance. There is no treaty, which I can find, that ſtipulates any thing in contravention of the principle.

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* Id. vi. 322.
† 1 Fred. Leonard, 176.
‡ Corps Diplom. vi. 404. § Id. vi. 411.
‖ 1 Fred. Leon. 211. §§ Id. 313. ‖‖ Id. 348.
‡‡ Corps Diplom, vi. 406.
†† 1 Fred. Leon. 394. ** Id. 3, 56.
†† Corps Diplom. 415.

Thus far, then, we have ſteered our courſe, with certainty and preciſion, as to the ſtate of the law, to the end of the fifteenth century, and nothing ariſes, hitherto, to trench upon the mode of reaſoning adopted, namely, that the law exiſting in a knowledged vigour, the ſilence of treaties, far from diminiſhing its force, is a proof that no attempts had been made to exempt any one from its proviſions. But if this was the caſe at the end of the fifteenth century, and things continued the ſame, or pretty much the ſame, throughout the ſixteenth, who is to ſay, that the leaſt alteration in the law was effected during that latter period?—The acknowledgment of Schlegel himſelf, as to its ſtate in the fifteenth, it ſeems fair to extend to the middle of the ſeventeenth, ſince, with the exception of the three treaties he mentions, in the previous periods, and which we have proved him to have ſtrangely misconceived, he faſtens upon no one hiſtorical fact, much leſs any treaty, forming an exception to the rule of the *Conſolato*, until 1642, from which time, as he ſays, the change began. He, indeed, adverts ſlightly, as Hubner did before him, to the conduct of Elizabeth, when ſhe ſent over Winter and Beal to Zealand, to vindicate, as he ſays, les droits du pavillon neutre;* but how ſhe vindicated thoſe rights, how little was done for the "*pavillon neutre*," how entirely it was a caſe of robbery, acknowledged by the hiſtorian of Holland himſelf, and, therefore, out of all reach of an argument upon the law of nations, has already been too amply ſhewn to enlarge upon it again.†

The commercial treaties of the ſixteenth century, are, comparatively, few; and of thoſe, not one, that I have been able to diſcover, derogate, in the ſmalleſt point, from the rule of the Conſolato, confiſcating enemy's property

* Schleg. 52.

† Fred. Leon. ii. 178, 385, 458, 583.

which

where found; and as we left that rule, in its full vigour, at the end of the fifteenth, it muſt be ſuppoſed ſtill to have continued in all its ſtrength under every treaty which assumed the regulation of commerce, but which yet did not derogate from a point long ſo acknowledged and held ſo ſacred. It is no where mentioned, either by way of affirmance or denial, in the treaties between England and France of 1514, 1525, 1530, 1546, 1564, 1572;* between France and Sweden, 1559;† between England and the Emperor, Charles V. 1589;‡ between that Emperor and Denmark and Holſtein, 1544.§ between Denmark and the Hanſe, 1560; or Scotland and Holland, 1594.‖

At the ſame time, many of theſe treaties contain ſtrong general ſtipulations againſt affording any aſſiſtance to a belligerent, either directly or indirectly; ſtipulations, by the way, which we may as fairly uſe in affirmance of the principle, as our opponents in the argument uſe the general permiſſion to trade in its derogation. On the other hand alſo, it was in the ſixteenth century, at two ſeveral times, once toward the beginning and once toward the end, that the famous ordinances of France, relative to the marine, were compoſed under the auſpices of Francis I. and Henry III. Theſe, as has often been obſerved, gave the fulleſt ſupport to the rule of the *Conſolato*, and aſſerted the privileges of belligerents to an extent far beyond what had before perhaps been known.

In this age alſo, raged to its height that great pretenſion of belligerents to cut off all neutral commerce whatſoever with their opponents; inſtances of which are ſo abundant and ſtrong in the hiſtory of every

* Id. 564.
† Corps Deplom. viii. 42.
‡ Id. 274. § 2 Valin 252, 3, 4.
‖ Rec. des Trait. ii. 303, 459. It is no where mentioned at the peace of Vervins, 1598.

maritime country of Europe, that to enter into their detail, would prolong this diſcuſſion to an unbounded length. Grotius took notice of many of them, in the paſſage in which he gives his ſanction to the *Conſolato*;* and in general we may obſerve, that this is in fact the true point of all the ſtrongeſt examples which are cited againſt our principles, but which prove nothing as we have ſeen, except a general right to trade on the part of the neutral, the reaſonableneſs of which no one now denies.

Soon after the marine ordinance of Francis I. was promulgated, ſome of the neutral powers felt its its ſeverity; and I find, that in conſequence of ſtrong repreſentations from the Emperor, Charles V. on the part of his provinces in the Netherlands, and after conferences on both ſides, the ordinance complained of was abrogated. But, though the ſeverity of confiſcating the ſhips of friends for carrying the property of enemies was removed, the right to ſeize that property was no where trenched upon. On the contrary, by the very terms of the regulation publiſhed for aboliſhing the ordinance, it is preſerved in all its extent; the puniſhment of the neutral is alone annulled, and thus while the humanity of the Conſolato was perfectly reſtored, its juſtice and legal ſeverity were integrally preſerved.†

This was in the year 1550, but ſeven years after the promulgation of the French ordinance, whoſe rigour was thus

* De Jur. Bel. p. 3, 1, 5, 4, notis.

† Scavoir que doreſnavant toutes, & quantes fois qu'on aura fait d'une coſte ou d'autre aucune prinſe, ou arreſt, ſoit en mer, ou par terre de quelques marchandiſes ou autres biens de quelque qualité, qu'ilz ſoyent, eſtans les dits marchandiſes ou biens trouvez en navires, ou charioz & autres voitures des ſubgectz tant dudit Sr. Roy que de nous ou en navires d'ennemis, que du bien ainſi prins & arretté tant par mer que par terre ſera ſeulement declaré confiſquié *ce qui ſe trouvera appartenir aux ennemis*, ou ſeulement la marchandiſe prohibée, & deffendue, & non autre, ſans ce que pour l'advenir ladite ordonnance (qui des maintenant demeure du tout nulle, & revocquée) puiſſe eſtre allegnée ny miſe en avant pour le regard desd. prinſes. Rec. des Trait. ii. 689.

ſoftened

softened towards the inhabitants of the Netherlands. But neither was this mildness extended to other nations, nor did it long continue to favour the Flemings themselves; for in 1583, the regulations of Francis I. were restored in all their severity by Henry III. and they never afterwards ceased to be the maritime law of France, except when modified in favour of particular nations, by the express stipulations of particular treaties. It appears also that these laws, hard as they were considered by the Emperor himself, formed a part of his own commercial regulations on the side of the Netherlands; since the language of the regulation avows that it was observed in the dominions, both of the Emperor and of the King.*

We have thus conducted the principle of the Consolato in full, and even in augmented vigour to the end of the sixteenth century; nor, upon the strictest investigation, is it to be found, either from the internal regulations, or the public treaties of the times, that any thing like (I will not say the new principle but) the new pretension, had been hitherto brought forward in Europe. If it had, doubtless the learned and industrious professors of Denmark, the zealous advocates of Holland in various Dutch wars, and the investigating delegates of the King of Prussia in 1752, would have long since pointed them out. It is to be lamented, I think, that the learned civilian, whose assertions we are thus driven to oppose, has contented himself with such very vague and indeterminate language as he has used, in speaking of one of the most important customs of maritime nations, as found in their treaties. He acknowledges, it is true, that the treaties of the fourteenth and fifteenth centuries knew no other principle; but after this,

* Charles, &c. à tous ceux, &c. comme pour faire cesser les plaintes et doleances faictes par aucuns noz subgectz, &c. de la rigeur de certaine ordonnance réspectivement observée en nos pays de pardeca et au Royeaulme de France, &c. Recueil des Traitez. 2. 689.

in pretty marked terms, as was obſerved before, he ſays, "il fut en conſequence determiné qu'un "vaiſſeau neutre ne pourroit plus être arrêté parce "que il aûroit abord des marchandiſes ennemies.*" How, or when, this was determined, or in conſequence of what, he has not condeſcended to ſay: but having mentioned the *fifteenth* century as his laſt date, he goes on to obſerve that the greater part of the treaties, after the middle of the *ſeventeenth*, purſued an oppoſite line; thus leaving a tolerably large chaſm of one hundred and fifty, or perhaps two hundred years, without any definite account, or rather without any account at all, of what was the commercial maxim purſued by its treaties. That account, if this were mere matter of hiſtorical enquiry, the library of every ſtateſman would be able to ſupply; but how will Schlegel ſeriouſly anſwer to this country, to his own, and to his conſcience, for leaving ſo great a ſpace of time in total neglect, in order afterwards to call it by the invidious name of mere antiquated law? The queſtion is immenſe in its extent, and mighty in its conſequences; the Profeſſor's book is read by the governors of his nation, and the nation itſelf; they have armies, fleets, and allies, ready to ruſh into bloody quarrel, if cauſe of quarrel is made out; and where ſo many thouſand lives are to play for the ſtake; great caution, and even painful enquiry, one would think, ſhould be exerciſed, before any thing is hazarded in ſo ſtupendous a cauſe.

From this ſilence, however, I think it reaſonably follows, that even if we were deprived of all light upon the ſubject, the ſame confeſſion, on the part of the profeſſor, muſt continue; and that, with his acquieſcence, we may enter upon the ſeventeenth century alſo, with the maxim of the Conſolato, in the moſt entire ſtate of diplomatic acknowledgment.

* Schleg. 5.

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The ſeventeenth century is a rich mine of hiſtory, in all that regards and all that can intereſt mankind. Nations emerged from barbariſm and bigotry; the vaſteſt political objects; concentrated and univerſal alliances; the elevation of the rights of war and peace into a ſcience, itſelf a moſt memorable epoch; a great Republic riſing into acknowledged ſovereignty; a war, of thirty years, diſplaying the moſt ardent gallantry, and the moſt conſummate abilities in generals and ſtateſmen, and ending in a peace, which formed, ever afterwards, the baſis of the political intereſts of Europe; in addition to this, the moſt ſhining characters in all the ranges of human activity; Henry IV. Sully, Guſtavus, Grotius, Richlieu, D'Avaux, Cromwell, De Witte, Temple, and King William; theſe are the meteors which every where ſhine out upon the enquirer into this eventful period!

It may be ſuppoſed, that ſuch an age was fertile in negotiation upon every ſubject, and in treaties upon every queſtion. Nor is expectation diſappointed: The conventions of theſe times ſwell into a ſize, both in number and length, beyond all proportion to thoſe of preceding ages; and there is ſcarcely a point of political diſpute, much leſs a principle of political conduct, which is not hunted down and ſettled in the active negotiations and the laboured treaties, which every where meet us, in our reſearches, during this wonderful age!

It is, therefore, of no ſmall advantage, in inveſtigating the opinions of ſo buſy and intereſting a period, that we have the important datum, to which we have alluded, in order, the better to arrive at truth, in our enquiry.

It is to be recollected, that hitherto, no one treaty has been found, to contravene the ſtipulation of the *Conſolato*. On the contrary, ſome have been made in its ſupport, and ſome particular ordinances have gone a great way farther; and, whenever they have been found too harſh for a continuance,

tinuance, the new agreements which worked their abgoration, avoided, with care, the deſtruction of the original law. Again, therefore, we ſtart from this as a truth; that the rule of the *Conſolato* was the rule of the commencement, at leaſt, of the ſeventeenth century; and conſequently, that though many commercial treaties are ſilent with reſpect to it, their ſilence is the effect of acquieſcence alone, and they muſt therefore be ſuppoſed to adopt and incorporate it with themſelves in the fulleſt extent. From the year 1600 to 1642, the epoch laid down by *Buſch*, and adopted by *Schlegel*, for the commencement of a new law, there ſeems, even from them, to be no oppoſition to this. During that interval, fifteen treaties of commerce, or relating to commerce, were framed by the maritime ſtates of thoſe times. Of theſe, the rule is expreſsly relaxed in none, was ſtrongly confirmed by five, and is acquieſced under, in ſilence, by ten. Conſequently, according to our principles, they are all of them in favour of the *Conſolato*, without a ſingle exception.

The treaties which make no expreſs mention of it, either in affirmance or derogation, and which, therefore, as we contend, are ſilently acquieſcent, are thoſe between France and the Hanſe towns, in 1604;* between England and Spain, 1604; in which, however, there is an expreſs prohibition to trade with the enemies of Spain in Holland;† between England and France, in 1606;‡ Spain and Holland, (the twelve years truce,) in 1609;§ Denmark and England, in 1621;** France and Ruſſia, 1629;†† Poland and Sweden of the ſame year;‡‡ Denmark and England, 1639;§§ Sweden and Holland, 1640;‖‖ and France and Portugal, 1641.***

* Recueil des Traites, iii. 19.
† Du Mont Corps Dip. v. 24. ‡ Id. 62. Id. ib.
§ Id. 320. ** Id. 597. †† Id. 598. ‡‡ Id. vi. 173.
§§ Id. 193. ‖‖ Id. 216.

Thoſe

Thoſe which confirm the Conſolato, either by expreſs words or very ſtrong implication, are the treaty between England and Holland, in 1625, againſt Spain; in which Charles I. ſtipulates, that he will inſtigate all other princes, ſtates, and communities which are neuter, to diſcontinue all commerce with Spain; in ſuch a manner, however, as that they ſhall ſuffer no loſs by their compliance; but in caſe they will not comply, then it is agreed that all ſhips in the high ſeas, *ſuſpected of ſteering towards Spain*, ſhall be ſtopped in order to be ſearched, without however being retarded or damaged: (I ſuppoſe in the caſe where no prohibited property is found) at the ſame time all other commerce is to be open to them without let or diſturbance; and there is an expreſs article, which ſtates that nothing in the treaty is to be conſidered as any innovation, change, or interruption in the freedom of navigation and commerce, either of the ſubjects of the contracting parties or other neutral ſtates.*

The next treaty in which this belligerent right is to be found acknowledged, not expreſsly (for according to us, in a point ſo unconteſted, that was not neceſſary,) but implied as a well-known law, is that of St. Germains, between France and England, 1632, in which the third article regulates the right of ſearch. "Et d'autant, ſays that article, ſous pre-"texte de recherche et viſite, *qui ſe pourroit faire* par les vaiſ-"ſeaux de guerre de l'un ou de l'autre prince, ou de leurs "ſujets en mer, des navires marchands, *pour ſçavoir s'ils ſont* "*chargez de merchandiſes defendues et appartenants aux ennemies*, "&c. &c.†" It is needleſs to point out to perſons, acquainted with the rules of reaſoning, that *pretexte* muſt mean the pretence of ſomething lawful; and that *qui ſe pourroit faire*, is proof that what follows is the *legal* right to ſearch for enemy's goods, which are alſo here placed in the ſame rank with defendues.

* Id. x. 280. the 21ſt. 22d. 23d. and 40th articles.
† Fred. Leon. v. 44.

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The next inſtance is the treaty between Denmark and Spain, in 1641, in which the fulleſt rights of navigation and commerce are granted to the ſubjects of one another, clogged, however, with the moſt marked prohibition as to the property of the Dutch, with whom the Spaniards were at war, or of any other hoſtile country. And in order the better to prevent the carriage of ſuch goods, all merchandiſe whatever, exported from either Spain or Denmark, is to be regiſtered and ſealed with the ſeal, and have the certificate of the country whence it comes; ſo that Dutch, or any other enemy's property, may be eaſily diſcovered; and as ſuch, confiſcated: 'comme des marchandiſes de contrebande.'*

In this period alſo, notwithſtanding what has been ſaid by Hubner, that the Muſſulmans of the Barbary States gave greater liberty than Chriſtians, &c. to the exerciſe of commerce, and allowed the principle in queſtion, I find ſome treaties not without ſtipulations of a very contrary nature. In the treaties between France and Algiers, in 1628, and France and Morocco, 1630, a period when the former was the moſt favoured of the Chriſtian nations in the Mediterranean, the firſt allows not the freedom of enemy's property until the Algerine ſhall have taken the ſhip into port, in order to exact a duty, or toll, upon ſuch part of the cargo:† the laſt confiſcates it altogether; and the ſtipulation is, that the French veſſel ſhall alone be free.†

And thus the matter ſtands in the maritime treaties of Europe, from the time of Edward III. until 1642; when, and not till when, according to Schlegel himſelf, a new ſyſtem of commercial regulation was ſet up. The confeſſion implied by that aſſertion might probably have ſpared much of the preceding detail; but as, in all human inſtitutions, much of what is, depends greatly upon what has

* Corps Diplom. xi. 210. Art. v.
† Corps Diplom. x. 559. ‡ Id. 614.

been;

been; as, in many points, the right underſtnding of what every day paſſes is, at leaſt, facilitated, if not entirely generated by a knowledge of the ſources whence it flows, and the changes it has undergone; the preceding reſearch will not be regretted by thoſe who regard the ſubject with any thing more than temporary views. At the ſame time, it is not pretended that all the maritime conventions that exiſted have been here brought together. There are, without doubt, many more; but theſe are all which, from ſuch narrow ſources as are before me, I have been able to find, and for whoſe fidelity I am therefore able to anſwer. It is, however, little probable, that even from thoſe which may, for ought I know, remain behind, any thing can be found adverſe to the point we have arrived at; ſince, if there was, the Daniſh civilians, who were ſo intereſted in the diſcovery, would, doubtleſs, have long ſince publiſhed it to the world: and the miſtakes of their zeal in citing ſuch treaties as thoſe of Edward III. and Charles I., and the tranſaction of Elizabeth with the Zelanders, prove to us at what ſlight and fragile ſupports they are willing to graſp! *

We now, then, arrive at that important period whence, *as it is ſaid*, a new principle of government for Neutrals and Belligerents takes its progreſſion. But, although it is indubitable, that, from that time downwards to the æra of the firſt Armed Neutrality, there are a vaſt number of exceptions to the rule which, as we have ſeen, had hitherto reigned paramount to all exception; yet we ſhall probably heſitate a very long time before we can lend our belief to the aſſertion, that the contrary rule became the rule of Eu-

* See pages 51, 52.

rope.

rope. Even the ground for the fuppofition in the outfet is weak; for, allowing all poffible credit to the foundnefs of the conclufion, as to the real thing which is ftipulated by treaty (a conclufion, however, which paft experience would, perhaps, induce us to deny), the exiftence of but five and thirty treaties, during a period of one hundred and thirty-eight years, would alone make us doubt of their conftituting fo vaft a majority as muft make a rule. But when we add to this, that it was a period the bufieft, the moft intriguing, the moft fertile in every fort of alliance, and in opportunities to draw forth every fort of maritime intereft; the period, in fact, of Europe's hiftory, when the Maritime Powers began firft to aflume the lead, where formerly they had been merely fecondary to the Continental; the period when Holland was at its zenith; when Pruffia was ftruggling into notice; when France became commercial; when Ruffia became maritime; when all the States, whether continental or maritime, came to be linked together in fuch clofe connection, that the flighteft movement of one was the fignal for conventions amongft all the reft: under thefe characteriftics, and during fo great a length of years, that fo fmall a number of treaties fhould form a decided and conftitutional majority, is an aflertion which we fhould be indeed to paufe long upon before we gave it our implicit belief. That there may be five and thirty treaties, from the year 1642 to 1780, which are favourable to the principle, I am not difpofed to queftion, though I know not the fact: that they form a majority, and that a very great one, fo as to give the *general rule* of Europe, is the point to be difcuffed; and that point muft depend upon the fame view of the fact which we have all along been taking of it in the earlier parts of the hiftory. In particular, we muft ftill proceed to the enquiry with this clear guide in our minds; that as, hitherto, for the fpace of at leaft four hundred years, no one convention had been made in derogation of the *Dominio del Mare*; as, on the contrary, many treaties,

as we have ſeen, were made directly in its affirmance; and as what alterations were attempted by the ordinances of particular nations, were all of them built upon its extenſion, to a degree of even unjuſt ſeverity, it is impoſſible not to ſay that, in 1642, it was ſtill the great and acknowledged rule of Europe: conſequently, in every treaty which did not except againſt it, whether mentioned or not, it muſt ſtill be taken to be the known law. Now, in ſurveying the treaties of the important period from 1642 to the peace of Utrecht, we do find that ſome have departed from it; *giving, however, very marked compenſations:* more have confirmed it expreſsly, and ſtill more have confirmed it by this ſilent acquieſcence; for the better aſcertainment of which it will be right to proceed chronologically, though curſorily, in our review of the treaties.

The firſt upon record, which I find after the new period commences, is certainly not of the complexion of thoſe which *Buſch* muſt be ſuppoſed to mean. It is that between France and Courland, 1643, which gives to the latter the fulleſt freedom of commerce and navigation through all her ports and ſeas. There is, however, a ſpecial article, which, in terms, prohibits the Duke from availing himſelf of the liberty thus granted to aſſiſt the enemies of France, by carrying to them any ſort of merchandiſe;* which is obviouſly a much greater extenſion of the Belligerent claim than if it had been confined to the right of ſeizing the property of the enemy himſelf.

The next in order is the treaty of Chriſtianople, between Denmark and Holland, 1645,† in which, though made expreſsly for the arrangement of commercial diſputes, no mention whatever is made of this Neutral claim. The next is between Denmark and France, November 1645; a cloſe

* Corps Diplom. II. 212. vol. 5. † Id. 312.

and

and commercial alliance; in which, however, there is alſo ſilence as to the claim. But the ſtipulation is expreſs—That neither power ſhall afford help to the enemy of the other, directly or indirectly; and the twelfth article in particular acquieſces under the antient rule, when it ſtates, that the freedom of commerce conſiſts in maintaining things exactly *as they are*, in the weſtern and northern oceans, and in the Baltic ſea.*

The next is the treaty of Paris, between France and Holland, 1646; and as it contains an argument of ſome little nicety, as to its conſtruction, it deſerves to be mentioned at ſome length. It will be recollected, that the ordinances of France at this time confiſcated not only all enemy's property, found on board Neutral veſſels, but the veſſels themſelves, as good prize. This had been already felt, and altered, on the repreſentations of Charles V.; and, an alteration was now again ſolicited by the United Provinces. The preamble, therefore, ſtates, that many complaints having been made, that the ſhips of the King were in the habit of ſeizing merchant veſſels, in which enemy's property was found, and confiſcating *the ſhips themſelves* as good prize, according to the marine ordinance of the late King Henry III.; and the King being diſpoſed to apply the beſt poſſible remedy to the *inconveniences attending the execution of this ordi-*; 'et ſe relâcher,' to uſe the words of the treaty, 'de la rigeur 'd'icelle *pour quelque tems* en faveur des dits Sieurs les Etats, 'à *la priére* que luy en a été faite par le Sieur Oſterwick. 'leur Ambaſſadeur,' names his Commiſſioners to confer with the States, who determine upon the following articles.†

Now, to pauſe here a moment, it is impoſſible not to be ſtruck with the marked tone of the treaty, as it regards a very important point; namely, that the whole is condeſcen-

* Corps. Diplom. 328. † Fred. Leon. 5, 223.

ſion on the part of the King; and as ſuch, of courſe, from their very agreement to the treaty couched in theſe terms, accepted by the States. He relaxes his rule, for a time only, in their ſpecial favour, and at the prayer of their Ambaſſador! Not a ſentence is breathed concerning a liberty or right, under the Law of Nations, to the abrogation of this ordinance; but all is pure matter of conventional relaxation from an admitted rule, at leaſt of France, and to exiſt only for a time. And what is it that is determined? 'Qu'en attendant 'quel'on ait fait un bon réglement, on ſurſeoira l'execution 'des articles de l'ordonnance du Roy Henry III. de l'an '1584 ſur le fait de la marine, portant que les marchandiſes 'appartenantes aux ennemis, donnent lieu à la confiſcation '*de celles des amis*, et ne ſera plus obſervée n'y pratiquée 'à l'egard des ſujets des Sieurs les Eſtats Généreux des Pro-'vinces Unies des Pays-Bays, pendant le temps *de quatre* '*années*, en telle ſorte que les navires qui trafiqueront avec 'la patente de l'admiral des Provinces Unies la mer Medi-'terrannée et du Levant, et ſur l'ocean du dit admiral, ou 'des villes et lieux aux ſujet deſquels les dits navires appar-'tiendront, ſeront libres, et *rendront auſſi toute leur charge* '*libre, bien qu'il y euſt dedans de la marchandiſe*; *même des* '*grains et légumes appartenans aux ennemis:* ſauf et ex-'cepté toutefois les marchandiſes de contrebande*.

According to the well-underſtood language of the preſent day, if this ſtood alone, the phraſe, 'rendront auſſi toute 'leur charge libre,' would convey very clear and definite ideas. De Witt and the Dutch had little doubt about it eight years afterwards, when it came into diſpute; and they underſtood it as, we muſt own, with modern ideas, all Europe would now underſtand it to mean, that not only the ſhips and property of friends, but the property of ene-

* Id. Ibid. Artic. I.

mies alſo, ſhould be free from confiſcation. Allowances, however, muſt be made for novel language, (for at the time it was new); and, at all events, deference muſt be paid to the intendment of both parties; and if the Dutch made uſe of one interpretation, another was put upon it by the French: the former yielded their object, the latter never did. In the year 1653, De Witt endeavoured, through Boreel, to negotiate a great commercial treaty with France, in which he laboured hard to be allowed his maxim of '*Free Ships Free Goods*,' in the modern underſtanding of the phraſe; that is, that enemy's property ſhould not be ſeizable. But Boreel informed him, that he never could obtain it under that conſtruction of its terms; and then, for the firſt time, at leaſt upon record, after the ſigning of the treaty 1646, it appears that the French Government had very different ideas from De Witt and Boreel of what was really meant by its important firſt article. Being inſerted, ſaid the former, merely in order to ſuſpend the effect of the ordinance of 1584, its interpretation was to be guided entirely by the ſubject matter contained in the ordinance; and that being to protect an old and known law, by adding to the breach of it a heavy penalty which had never before accompanied it, and which was now complained of, any agreement to remedy the inconvenience of the ordinance could go no farther than the inconvenience mentioned: it might take off what was complained of, namely, the penalty, but could never abrogate the law itſelf. Conſequently all that was done, was to reſtore things to their old ſituation before the ordinance, which was, that the enemy's property in the ſhip might be ſeized as of old, but that the ſhip itſelf, and all Neutral property on board, were to be conſidered as free; and this was all that was meant, when it was ſaid that the ſhip ſhould be free, and render alſo its cargo free: thus applying the word *free* to

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the ſhip and Neutral cargo alone, which were not ſo conſidered by the ſeverity of the ordinance.

I own, this reaſoning appears to me to be convincing; and the only cauſe for doubting of its ſoundneſs ſeems to ariſe from the long habit we have been in of annexing a particular and different interpretation to the phraſe, *Free Ships Free Goods*. At this period, we have no ordinance of 1584 to encounter, as the ground which gave riſe to the diſpute; but have been accuſtomed long to conſider it as an abſtract propoſition with a defined meaning, totally diſtinct from any hiſtorical circumſtance; and, therefore, by a prejudice by no means unnatural, divert the leaning of our minds to one, and only one, interpretation. Placing ourſelves, however, in the ſituation of the French miniſtry in the middle of the ſeventeenth century, and only eight years after the relaxation of the old ordinance of 1584, we ſhall not, perhaps, conſider the diſpute as ſo clear in favour of the Dutch. One argument, alſo, there is on the ſide of the good faith of the French Government, that grain and proviſions, in thoſe times, fell in amongſt the general articles of contraband; the carrying of which being, when not ſtipulated for to the contrary, a cauſe for ſeizure; the exemption from it, in the caſe ſtated by the words of the article '*même des grains et légumes*,' points entirely to the ſhip and the neutral part of the cargo. When this difference aroſe alſo, it was not a ſudden, or temporary change, to ſerve a particular purpoſe, in interpreting the treaty of 1646, but a diſcuſſion, in the outſet, of the meaning of terms to be inſerted in a much larger treaty of commerce, and for a much longer time, then in the act of being framed. Boreel, it appears, had preſented the project of the treaty containing this ſelf ſame article in terms; and had written, as it ſhould ſeem, to De Witt, to inform him that his projet was not oppoſed: he was ſurpriſed, therefore, to find that he had been totally miſtaken when he learned, after having announced it to De Witt,

that a very different ſenſe was put upon thoſe words; and, hence, when the Penſionary replies to his ſecond information, he ſays, that it appeared to him, either that the French miniſters were miſtaken in that conſtruction, or that Boreel himſelf had repreſented the thing in a wrong light in his letter; ſince, by the detail of the article, though the phraſe is not there, the rule of Free Ships Free Goods '*y eſt nettement* exprimée.'

Be this as it may, the French, as we ſee, interpreted it differently, not only in the projet of the new treaty preſented by Boreel, but alſo in the old one of 1646; and, as he ſays himſelf, had alſo put it in practice, 'à la vérité fort mal;' and, therefore, as they were always at liberty to put the ſame explanation upon it, he adviſes a more clear and preciſe form of words, unconnected with the ordinance of Henry III.; and propoſes the introduction of the maxim of 'Free Ships Free Goods,' in terms, with ſufficient explanations to put it out of doubt, according to the Dutch ſenſe of it; in which propoſal he did not ſucceed; and it was, for ſome years afterwards, altogether rejected by the French*.

The hiſtory of this diſcuſſion, of courſe, will explain what was meant by the next treaty we find on the ſubject, May, 1655, between France and the Hanſe Towns; the third article of which is preciſely the ſame; the duration for fifteen years†. But, though the form of words is ſo particular, and, apparently, ſo ſtrong againſt the rule of the *Conſolato*, it is impoſſible, after the pointed diſcuſſion as to their meaning, to have any doubt of what was offered, and what was accepted. The French, who had continued ſo firm to their own interpretation with the flouriſhing

* See the whole of this diſpute, in the Lettres et Neg. de De Witt, tom. i. 80, 81, 104, 105, 108, 129.

† Corps Diplom. xii. 103.

Dutch

Dutch Republic, that the treaty in contemplation was entirely dropped, would hardly, within a twelvemonth almoſt, give up the whole of their objection in favour of the declining Hanſe. Whatever, therefore, was the form of words uſed, there can be no doubt as to the meaning of theſe two treaties; and, if theſe are included amongſt the thirty-five enumerated by *Buſch*, as trenching upon the *Conſolato*, they ought to be inſtantly expunged. In the ſpace of five years afterwards, Denmark and Sweden made two treaties of alliance and commerce together; one in 1658, and another in 1660; neither of which makes any mention of an innovation on the *Conſolato**; and Spain had formed another with the Hanſe Towns in 1647, in which ſhe gave them the fulleſt liberty of commerce; with the ſtrong exception, however, that they ſhould give ſecurity by regiſters, certificates, and other modes, not to bring Dutch property into any of the places within her juriſdiction; a pretty forcible example, that the rights of commerce were not in the treaties, even of this time, enjoyed in the ſame manner as during peace†.

What De Witt himſelf thought of the rights of Neutrals, when his own country was Belligerent, may be collected from the famous placart publiſhed by Holland, in 1652, upon the approaching war with England. Not content with interdicting all carriage by her own ſubjects of neutral property into the ports and harbours of her enemy, ſhe gives notice to Neutrals themſelves, though in their paſſage to other neutral countries, not to be found on the coaſts of England, or its dependencies, on pain of incurring ſuſpicion; and, if found to be laden 'en partie ou en-'tierement de quelque munition de guerre *ou de bouche*,' on pain of being brought into the ports of Holland, and confiſcated by the Dutch Admiralty‡.

* Fred. Leon. v. ſub. an. † Corps Diplom. xi. 424.
‡ 12 Corps Diplom. xxxvii.

About this time, the famous treaty of Upſal was made between Cromwell and Chriſtina, under the auſpices of Oxenſtiern and Whitelock. It acknowledges the rights of commerce to the full; it expreſsly ſtates, that although the laws of friendſhip forbid either of the confederates to aſſiſt the enemies of the other, yet it muſt by no means be underſtood, that that confederate, who is not at war, ſhall carry on no manner of trade or navigation with thoſe enemies. Yet, while in this ſpirit of complete neutral independence, the very next article, by glancing at it curſorily, and as a thing known, acknowledges the extent of our rule, in perhaps a ſtronger manner, than if it had contained an expreſs proviſion on the ſubject. 'Leſt ſuch free navi-
'gation,' ſays the article, 'ſhould be prejudicial to the
'confederate that is at war, *and leſt hoſtile goods and wares*
'*ſhould be concealed under the diſguiſe of friendſhip*; and,
'for removing *all ſuſpicion and fraud*, paſſports and certi-
'ficates ſhall be provided*.' It is needleſs, I think, to point out the ſtrong and pronounced manner in which the Belligerent right is thus acknowledged; it is only neceſſary to add, that in the two treaties which followed hard upon this, one in 1654, the other 1661, the ſame ſort of language is held, both with reſpect to Neutral and Belligerent†.

Several treaties were about this time framed, which, for brevity's ſake, may be mentioned all together, though of different dates, becauſe all coming under the ſame claſs of perfect, though ſilent acquieſcence. Theſe are,—thoſe between Cromwell and the Dutch, 1654‡; Cromwell and France, 1655‖; Denmark and Sweden, 1658, and another, 1660 (mentioned before)§; Sweden and Moſcow,

* Chalmers's Treaties, i. 25, 26. † Id. xxxiv. 53.
‡ 12 Corps Diplom. lxxvii. ‖ 5 Fred. Leon. xi.
§ 12 Corps Diplom. 208.

1661*;

1661*; England and Prussia, 1661†; England and Denmark, 1661‡; and England and Holland, 1662 ‖. In none of these, though containing general stipulations, both for freedom of commerce and the withholding assistance to enemies, is the principle in terms either confirmed or denied; and, as it did not, in those times, from the abundant proof we have given, stand in need of being confirmed; we say, that not being excepted from, it was sufficiently acknowledged.

In the treaty between England and Holland in particular, it would have been denied upon a principle of right, could the age have allowed it. In the proposal for a maritime treaty, delivered by Nieuport, the Dutch Ambassador, to Cromwell's Government, December, 1654, he endeavours to obtain it by yielding, in the same sentence which contains the proposal, a right instead of it, which seems truly founded in the most impartial Neutrality. This was, that the goods of friends, taken on board the ships of enemies, should be restored; and the sacrifice of this, in the above proposal, accompanied the stipulation with respect to the other, without, however, being accepted by the ministers of Cromwell§. At the same time, the Dutch continued their negotiations for its accomplishment *upon these terms*, in other Courts; and, at length, had obtained it from Spain, in 1650; from Portugal, in 1661; and from France, in 1662. In the twenty-fourth article of the treaty, 6th August, 1661, the one right is set against the other in the following very clear and precise terms.

'Bona quælibet ac merces, sive ad dictos regem ordinis-
'que spectabunt sive ad utrumvis populum, si navibus alte-
'rutri parti inimicis hostibusque creditæ ac in iis depre-
'hensæ fuerint, non minus quam naves ipsæ in prædam

* Corps Diplom. 364. † Id. ib. ‡ Id. 400.
‖ Id. 426. § 3 Thurloe, xxxiii.

'cedant, ac fiſco occupantium addicantur: merces vero ac 'res quæcunque ad partes utrius libet hoſtem pertinentes, 'regis ordinumque jam dictorum aut utriuſcunque populi 'navibus impoſitæ, in eas fiſco nil juris eſto, adeoque nec 'detineantur, nec poſſeſſoribus intervertantur*.

This article is almoſt literally tranſlated in the thirty-fifth of the treaty which followed with France in April 1662†; and thus, it was, for the firſt time in Europe, and full twenty years after the commencement aſſigned for it by Buſch and Schlegel, that the maxim of *Free Ships Free Goods* began, at length, to exiſt.

We have this important fact, therefore, with reſpect to the introduction of this ſuppoſed *natural* right; that it never was ſtarted nor obtained as ſuch; that it was not acquired by force, as a thing calling upon all Neutral Nations to confederate themſelves for its accompliſhment; neither was it a free grant from a ſenſe of juſtice in Belligerents; but it was eſtabliſhed by conventions that ſtipulated mutual advantages, and, in particular, was accompanied by the voluntary ſacrifice of a right, really emanating from the Laws of Nature, and long acknowledged by the Law of Nations.

The right of an impartial Neutral to continue his trade with each Belligerent, ſo long as that trade can in no reſpect do injury to either, is certainly, from the firſt principles of juſtice, unconteſted and inconteſtable; and it would be difficult to ſhew how injury is done, or what interference there is in the war, by placing ſuch goods as are ſacred, from their Neutrality, and have, therefore, a right of paſſage all over the world, under the care and protection of a Belligerent flag. Something in point of prudence may be urged, to prevent their being expoſed to the accidents of war; but if

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* 12 Corps. Diplom. 366. Artic. 24. † Id. 415.

prevent

the Neutral chuſes to riſk this, it is impoſſible, I think, to conceive a well-founded reaſon for ſuppoſing, that any conflict of rights between him and the other Belligerent can ariſe from the procedure. This, then ſeems, an innocent, and, therefore, a natural right in the Neutral; as ſuch formed one of the proviſions of the *Conſolato*‖; and as ſuch was approved by Bynkerſhoek§; and amongſt commercial nations, who were themſelves not carriers, much fair advantage would, no doubt, ariſe from its exerciſe. In the times before us, for example, the Portugueſe were commercial, but not great carriers; while the Engliſh had many manufactures, and were alſo very great carriers: and they had fleets likewiſe to defend themſelves, and thoſe who would entruſt their property to their care, againſt almoſt all attack. It was, therefore, greatly to the intereſt of Portugal, that this right ſhould be enjoyed, in caſe of a war between England and Holland. In the ſame manner, France was, perhaps, at that time, ſtill leſs in the habit of freighting ſhips than Portugal; but ſhe had great and eſteemed manufactures, and natural produce in general requeſt; and it ſhould ſeem, that, in caſe of ſuch a war, it would have been impolitic to grant to Holland, that if ſhe choſe to continue to lade her merchandiſe on board of Engliſh veſſels, they might become lawful prize to them, in common with the veſſels themſelves.

This, however, we ſee, was done both by Portugal and by France, in the treaties we have been contemplating, and in the very article and the ſentence itſelf, in which they ſtipulate for the principle of Free Ships Free Goods. Thoſe, therefore, who contend that the principle is acknowledged, *by treaty*, to be a natural right, have to account for the pointed and incompatible circumſtance, that what was ſtipulated in the very ſame moment of time is, inconteſtably

‖ See page 33. 33.
§ Quæſt. Jur. Pub. cap. xiv.

pulated

an invaſion of natural right. Certain, at leaſt, it is, that thoſe who contend that the commercial rights of Neutrals are in no wiſe broken in upon by the event of war, but are exactly the ſame as in times of peace; and that this is acknowledged by the majority of the treaties, or, as they ſay, by the conventional law of Europe; muſt have either raſhly hazarded this aſſertion, or muſt reconcile the inſurmountable incongruities thus peculiarly preſented to them in the firſt two treaties, which contain an expreſs ſtipulation for the maxim in diſcuſſion.

The true reaſon of theſe ſtipulations is, in fact, to be found in the convenience of Europe, and not in any wild wiſh to uphold a law of natural juſtice. That law would and did decide upon both points, according to the ancient uſage; but from the growing and multifarious commercial connections of Europe, it was ſometimes made a queſtion, whether it might not be better to beat down all difficulty and entanglement, by ſacrificing both the Belligerent and the Neutral right; and hence they enacted, as it were by poſitive contracts, that in future there ſhould be no diſtinction as to property, but all ſhould obey the character of the ſhip.

We ſee, then, in what trammels, and how little partaking of that abſolute freedom of navigation, founded, as it is ſaid, in natural law itſelf, the principle before us was firſt introduced. Thoſe trammels have ever afterwards continued, and the whole proves very clearly, that both the one and the other were in direct derogation of natural juſtice, and ſimply matters of the pureſt convention. That it was convention, even in the minds of thoſe who framed the treaties, muſt, I think, be clear; ſince the new arrangement, beyond all contradiction, overturned the received and antient uſage; for it muſt be remembered, that *both* the proviſions of the *Conſolato*, which, as we have ſeen, had ruled the maritime conduct of ſtates for ages, were thus reverſed.

reverſed. And as one of them muſt be allowed, moſt particularly by the champions for Neutral Privileges, to have been founded in the cleareſt natural right; it muſt be ſuppoſed, that the other, which ſhared its fate, partook of its nature alſo. For, otherwiſe, the language of the aſſertors of Commercial Liberty muſt and can only be this:—We wiſh to deſtroy the tyranny of unjuſt uſage and antiquated maxims, and to reſtore our trade, which has ſo long been fettered, to its ancient and natural liberty: we therefore abrogate the principle of ſeizing enemy's property in Neutral veſſels, which was an arbitrary invaſion: and, from our hatred to arbitrary invaſion, we alſo abrogate the rule of allowing neutral property on board enemy's veſſels to be free, which was founded in juſtice. I ſee no poſſibility of avoiding this deciſive dilemma, in thoſe who can imagine that the introduction of the maxim before us into treaties was the mere effect of the '*progrès des lumiéres*,' bringing back things to the ſtate of natural liberty.

Without deſcending, therefore, to the folly and blindneſs of enthuſiaſm in a Treatiſe of Law, let us place the matter really upon its right footing, namely, that of particular agreement chaining up the Natural Law; and, like all other agreements of that kind, binding only ſuch parties as have contracted, and not amounting, nor capable of amounting, (even if the majority of treaties were far greater than ſtated) to the force and power of forming a law for thoſe who have made no agreement againſt it. Such, it muſt be remembered, is the vain and viſionary pretenſion *.

In uſing this language, however, let us not be deluded into the ſuppoſition, that the ſubject has occaſion for it. The fact ſtill remains to be ſettled from diplomatic hiſtory,

* Schleg. 56.

whether

whether the treaties of this ſort do actually exiſt in ſuch univerſality, as upon their own principles to warrant their aſſertion. In looking over the treaties, from the laſt that have been mentioned to the year 1715, I indeed find ſeveral that are couched in the ſame terms. They are thoſe between France and Spain, 1659, the Pyrennean treaty*; France and Denmark, 1662†; France and England, 1667, the treaty of Breda‡; France and Holland, 1678, the treaty of Nimeguen§; France and Holland again, the treaty of Ryſwick‖; Sweden and Holland, 1667**; England and Holland, 1668††; Sweden and Holland again, at Nimeguen;‡‡ France and England, at Utrecht§§; France and Holland, at the ſame place‖‖; and Ruſſia and Holland, 1715§‖§: in all, eleven treaties, compoſed by ſeven Powers.

But although all theſe, in their treaties, ſome with one and ſome with another, acknowledged the principle on particular occaſions, and with particular parties; yet they did not by any means acknowledge it in common, as binding upon all of them intermingled together. Though two, for example, might contract for its obſervance, whenever their own particular tranſactions came in contact; each might contract with others, either for the contrary ſtipulation, or for ſomething leſs; or might leave the matter wholly untouched. Thus France, though ſhe re

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* 1 Jenkinſon, 113. art. xix.
† 5 Fred. Leon. art. i. ii. iii. iv. viii.
‡ 12 Corps Diplom. 439.
§ 5 Leon. art. xiii. xxii.
‖ 12 Corps Diplom. 388.
** Id. 13. 37. art. viii.
†† Id. 13. 75. art. x.
‡‡ Id. 15. 440. art. xxviii.
§§ Id. 15. 218. art. xvii. xxvii.
‖‖ Id. 377. art. xxvi.
§‖§ Id. 471. art. ix.

verſed

verſed the rules of the *Conſolato* in her treaties with England and Holland, ſtipulated for the exact obſervance of that regarding enemy's property, in her treaty with the Hanſe Towns in 1716. It was indeed ſo exact an obſervance, that if the property was in ſuch large quantity as not to be conveniently laden on board the capturing veſſel, the Neutral was bound to attend her to the neareſt port in France for the diſcharge of the reſt*. Thus Denmark, though ſhe contracted to follow the maxim with France in 1662, implied her acquieſcence under the old law with England in 1670 †; and abſolutely renounced the French carrying trade by treaty with England and Holland in 1691 ‡. Sweden too, which had agreed to the principle with Holland at Breda, was at that moment under treaty not to purſue it with England §. And though Spain had fallen in with it, from the Pyrennean treaty to the peace of Utrecht, with France and Holland, yet with England in 1667 ‖, and with the Emperor in 1725 ¶, her ſtipulation was for the converſe of the maxim alone, namely, that neutral goods on board enemies' veſſels ſhould be confiſcated.

Clearer caſes of mere private compacts can hardly be conceived than are exhibited by theſe examples of the diverſity of the ſtipulation entered into by the ſame countries. Little, therefore, could they feel themſelves bound by any general rule, ſtill leſs by a general rule of natural and univerſal law. But what ſhall we ſay to that vaſt number of treaties expreſsly commercial, or including commercial re-

* Corps Diplom. 15. 479. art. xxii.

† Id. 7. part. i. p. 132. She implied it by ſtating, that though each party might trade with the enemies of the other, yet, in order to prevent the fraudulent concealment of enemy's property, paſſports, &c. ſhould be given. See articles xvi. and xx.

‡ Corps Diplom. 14. 293. 295. art. iii.

§ By the treaty, 1661.

‖ Corps Diplom. 7. part ii. 27.

¶ Id. 16. 115.

gulations, which, during the very times when the principle was canvaſſed, bargained for, admitted or rejected, by theſe different maritime States, paſſed the whole over in abſolute neglect? As the reverſe of the rule had hitherto inconteſtably governed Europe, are we to ſuppoſe that theſe were to give way at once in ſilence, and without the leaſt public indication of ſuch a change, to the comparatively few inſtances of alteration which had appeared? Or are we to ſuppoſe, that theſe inſtances formed the exception which, it is ſeen, it required new and marked language to introduce? The negotiators of the novel maxims puſhed it with the utmoſt activity, and at firſt had nothing but difficulty to encounter. It was Holland that made the ſignal for a change; Holland, that filled every maritime Court with propoſals for the introduction of the new principle; Holland, whoſe exiſtence almoſt depended upon it: while other nations, repoſing on their own reſources, balanced long upon the innovation, and rejected, at firſt, all attempts at its completion. It is to be obſerved alſo, as a conſideration of the firſt weight, that during the whole of this period, the queſtion, thus agitated, was uniformly entertained in almoſt every one of the works of public law, which ſo frequently raiſe and illuſtrate the literary character of thoſe times. The ableſt Civilians and Statemen were employed upon what was thus generally ſtarted; and their opinions, as we have ſeen, inclined uniformly to the ſupport of the exiſting law. It ſeems, therefore, almoſt impoſſible, by any magic of reaſoning, to come to the concluſion, that where a law has exiſted for four hundred years, is ſtill ſupported in the writings and opinions of all the learned men, and a vaſt body of treaties are daily forming, that take no notice of the change; it is difficult, I ſay, to conceive that a ſmaller number of conventions, acknowledging a new regulation, can form any thing

thing but an exception: certainly it cannot amount to a contrary rule itſelf.

We have ſeen that the treaties which introduce the new maxim, from 1642 to 1715, amounted to twelve: we have ſeen that thoſe which ſtipulate either different or contrary conditions, are ſeven: there are, beſides, 31, which make no mention of the rule one way or the other; and all theſe, we contend, bottom themſelves upon the old law, which we ſay the countries making them had never relaxed, except by expreſs convention.

Of theſe treaties we have already enumerated eight, which were formed about the time that gave birth to thoſe in which the maxim was firſt acknowledged in Europe. And there are, therefore, twenty-three which are wholly ſilent with regard to the ſtipulation. The firſt of theſe is the treaty between Denmark and Holland, 1666, made to aſcertain the rights of their mutual commerce, and expreſsly to repel the groſs invaſion of the neutrality of the former, by the Engliſh, at Bergen. The firſt article makes an enumeration of pretty ſtrong acts of violence, on the part of the Engliſh fleets and cruiſers; in particular are mentioned the ſeizure of Daniſh veſſels ſailing even to neutral ports, the cannonading of Daniſh forts, and other examples of unlawful attack; but nothing is glanced at with reſpect to any ſeizure for carrying enemy's property, which, amidſt ſuch prompt and raſh acts, muſt, doubtleſs, have happened. Nor does it form any part of the league to prevent this old Belligerent right on the part of England; or to ſtipulate for its diſſolution on the part of the contracting powers. At the treaty of Breda, between England and Denmark, although the queſtion was much agitated, and the maxim agreed upon between various of the other powers, it paſſed, as to them, in the ſame acquieſcent ſilence.

In

In the ſame year, 1666, France renewed a treaty with Algiers, in which no mention was made of it; at Breda* it was not touched upon, by England and Spain; nor afterwards, in 1670†: nor in 1669, by England and Savoy‡. It was equally diſregarded by England and Sweden, in 1666; by another treaty, 1674‖; and by France and Sweden, in 1672§. At Nimeguen, it was neglected by Sweden and Holland, although the Dutch propoſed, and obtained, the right of coaſting from one enemy's port to another**. At Bruſſels, previous to Nimeguen, the agreement upon coaſting, between Spain and Holland, proves nothing, by proving too much; for it is allowed even to their own ſubjects, either in their own, or neutral veſſels; and at any rate, the maxim immediately before us is left untouched††. So alſo it is in the treaty between England and the Porte, in 1675‡‡; in that between England, Sweden, and Holland, in 1700‖‖; and between Holland and Denmark, in 1701§§.

The Dutch treaties with the Barbary States, with Tripoli in 1703, with Tunis in 1708, and with Algiers in 1712*†*, leave the maxim alike in ſilence; in thoſe between Portugal and Spain 1701†*†; and Portugal and England 1703, it is equally diſregarded‡*‡. Thus it is alſo in the treaty between England and Dantzic 1706‖§‖; and at Utrecht in 1713; and by the ſecond treaty 1714, it was left unprovided for by England and Spain§‖§.

This laſt treaty renewed the treaties of 1667 and 1670, in which 'Free Ships Free Goods' was not mentioned;

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* 5 Fred. Leon. † 2 Chalmers, v.
‡ Corps Diplom. xii. 119.
‖ Id. vi. iii. lxxxiii. and vii. p. 1, 280. § 5 Fred. Leon.
** Corps Diplom. xiii. 440. †† Id. 325.
‡‡ Id. T. vii. p. 1, 297. ‖‖ Id. vii. 1, 475. §§ Id. xv. 32.
† Corps. Diplom. 15. 137. 252. 295. †*† Id. 31.
‡*‡ 2 Chalmer's Treat. 296. ‖§‖ Chalmer's Treat. 1. 100.
§‖§ Corps Diplom. 15. 393. 409.

though

though it was ſtipulated in terms that the converſe ſhould be allowed. We muſt remember all along, that whenever the maxim of Free Ships Free Goods was admitted, it was always accompanied with the reverſal of the other proviſion of the *Conſolato*, that Neutral property on board Enemy's Ships ſhould be free; and I am aware, that in ſome interpretations of very learned men it is ſaid, whenever this reverſal is ſtipulated for, which it frequently is, the other maxim follows along with it as a thing of courſe. This they ground upon the reaſon which has before been ſtated, that both principles take their riſe in convenience; and that, in order to avoid the confuſion, delay, and chance of injuſtice which may ariſe in aſcertaining the different national characters of the owners of the cargo, it is better to ſweep away the whole at once, under the national character of the ſhip.

Now, I own, this reaſoning does not appear convincing; ſince, though the argument, from convenience for the one or the other principle, or both, may be perfectly ſound; yet that intimacy of connection and indiſſolubleneſs of union between the two, which alone can render them inſeparable, does not appear to exiſt, ſo as to make the allowance of one an inevitable cauſe for allowing the other. That country, indeed, which ſtipulated for the one, might, very probably, be *diſpoſed* to ſtipulate for the other; but courts of juſtice could not aſſume, from the mere probability of that diſpoſition, that both were, in fact, granted, where only one was mentioned. Rather, on the contrary, we might ſuppoſe, that, from their very affinity, the prohibition of the one, without the mention of the other, is a ſtrong proof that the latter was never intended to be inſerted. And thus, the treaty of Utrecht renewing that of Madrid 1667, between Spain and England, which is the only between theſe countries which makes mention of either principle, it muſt depend entirely upon what is there ſtipulated; and as the con-

verſe only of the maxim we are diſcuſſing is there to be found, we are warranted, I think, in ſaying, that between theſe two great maritime ſtates the maxim itſelf is not allowed. So, at leaſt, does a great authority underſtand it, when he ſays, in his Diſcourſe on Neutral Nations, that no article can be found in the Spaniſh treaty, which grants the privilege in queſtion to that nation*.

At Utrecht the point was left untouched between France and Portugal; and thus, while thirteen or fourteen treaties, from the epoch of 1642 to the complete termination of the negotiations of Utrecht in 1715, are to be found, ſtipulating for the maxim in queſtion, whoſe univerſality in theſe times is ſo boaſted by Schlegel, ſeven are to be diſcovered, framed expreſsly on the oppoſite rule; and no leſs than thirty-one, by their ſilence, give it, under all the circumſtances, a moſt direct negation.

In this place, I cannot help recurring to what may be eſteemed a conſiderable authority on the ſubject, buſied as we here are in negative proofs. The Abbé Mably, in a book profeſſedly treating of the Droit Publique, as drawn from the treaties of Europe, gives large place to the whole ſubject of commerce, both in the abſtract, and as it is found in treaties; and he preſents a kind of conſpectus, under the title of 'Conventions Générales touchant la Navigation et le Commerce;' under which he arranges all that he conceives may amount to a general rule, concerning commercial ſtipulations; and theſe he collects from the univerſality in which they have been laid down by the conventions of Europe. But, though he enumerates all that has been demanded on the one ſide, and granted on the other, as it regards the maritime rights and duties of States; though he mentions all that has been ſettled by compact, reſpecting refuge in the ports of friends from tempeſts or pirates; or

* The Earl of Liverpool's Diſc. p. 20.

reſpecting

reſpecting the manner of exerciſing the right of ſearch, the extent of embargoes, the number in which armed ſhips ſhall enter each other's harbours, the nature of contraband, and the juriſdiction of Admiralties; though, to come nearer to our ſubject, he in particular takes notice, that it has been determined, that the goods of friends ſhall partake of the character of the ſhip which covers them, and be alike confiſcable in the Court of Prize; yet, ſtrange to ſay, the converſe of this wholly eſcapes him, and he takes not the leaſt notice, as a point of law reſolved on by treaties, or reſolved on any way, of the maxim of 'Free ſhips Free goods.' This negative proof of his opinion comes, at the ſame time, with greater weight, becauſe it is in the very part of his work in which he ſets up the viſionary queſtion as to the policy, humanity, and juſtice, of making war upon private property; leaning in this to the fanciful and wild ſcheme of a Military War, and a Commercial Peace. Conſequently, he ſtands claſſed eminently in the ſame rank with thoſe who wiſh to carry the rights of Neutrals to a height without limit; and his authority by them, at leaſt, muſt be conſidered as indiſputable.*

The treaty of Utrecht, and the conventions which grew immediately out of it, make perhaps the greateſt epoch in the regulations of Europe during the laſt century. Great intereſts, of all kinds, were there ſettled, forming the baſis of moſt of the treaties which were afterwards framed, and bringing the numerous ſubjects of diſpute in the century beforeto ſome ſort of order.

The wars and negotiations, and final arrangements of intereſt, which employed nations for the reſt of the age, although they gave great ſcope to the Governors of States, did

* See the Droit Pub. de l'Europe, fondé ſur les traités, par l'Abbé Mably. 2. 459 to 483.

not, therefore, wear that varied fort of complexion, or afford that immenfe diverfity of great general objects, which produce changes in long eftabliſhed and long reſpected rules. The Kings of the world fought or negotiated, as uſual, for the uſual objects of ambition or national intereſt; but the principles of public conduct were, from this time, ſettled into comparative uniformity.

From the peace of Utrecht, therefore, down to the famous period of the Armed Neutrality, nothing very material occurs, as to the principle before us, in the views and conduct of the maritime powers. It went on, as we ſaw in the laſt century, often ſtipulated for by commercial conventions, but oftener paſſed over in the treaties of the times. That it exiſted in the majority of thoſe that were formed, is not more true, during this period, than the laſt; that it was once, for the firſt time, ſet up as a natural right, diſtinct from all treaty, by the Pruſſian King, in 1752, is, as we have ſeen, true; but that it was inſtantly beat down by the cogency of the reply, ſo as, at leaſt, to produce an alteration of conduct, if not of ſentiment; and that the authority of three of the moſt learned of their time was directly againſt it, has alſo been ſet forth at large. Under all the inſults, injuries, and abuſes, which the right to invade enemy's property on board neutral veſſels had too often generated, no one, until the armed pretenſions of 1780, again thought of ſetting up the principle, either as a poſitive remedy, or an abſtract right, emanating from the indiſſolubleneſs of natural juſtice.

To return, however, to the point immediately before us, it remains ſtill to be ſeen, whether the conventions of the times, up to this epoch, continued, as aſſerted by Schlegel, to form a majority equal to the unheard of pretenſion,—to legiſlate for other independent Sovereignties. Into that point we are not now called upon to examine, but are merely enquiring as to the fact concerning the number in which the treaties exiſted.

The principle being, as we have ſeen, allowed by treaty, between France and England, France and Spain, and France, Spain, England, and Ruſſia, with Holland; all treaties confirming theſe, though not new in theſe points, are claimed to be taken by our opponents as enhancing the number in their favour. But, though much may be obſerved on the fallacy of that mode of computation, as the medium of truth on the ſubject, I have not been unwilling to obey the path they have pointed out, for the ſake of aſcertaining how far the aſſertion, as to *numbers*, is really well founded.

The treaties, then, of the ſeventeenth century, as to commerce, having been for the moſt part confirmed in the greater treaties of the eighteenth, I am willing to take ſuch treaties as thoſe of Madrid and Seville, of Vienna, Aix la Chapelle, and of Paris, as augmenting the number of thoſe which allow the principle amongſt all the contracting parties which had allowed it before. Upon this mode of calculation, the treaty of Seville, between France, Spain, and England, confirms the maxim between the two firſt, and the laſt and the firſt, in confirming the treaty of Utrecht.

It is alſo confirmed by the treaty of Aix la Chapelle, between France and England, France and Spain, Holland and France, and Holland and Spain: ſo alſo, by the treaty of Paris, in 1763, between England and France, and France and Spain.

I find it alſo allowed in the treaty between England and Tripoli, in 1751; England and Tunis, 1752; and again with both thoſe powers in 1762. There are alſo, as it is ſaid, others between Denmark and Spain, 1742; Denmark and Naples, 1748; Denmark and Genoa, 1756; and Naples and the Netherlands, 1752; and theſe for the preſent I am willing to take for granted*. On the whole, then,

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* This enumeration was made in a cauſe in the Court of Prize here, but I have not yet had an opportunity of ſeeing them. I a little

this enumeration of conventions from 1715 to 1780, which stipulate for the observance of the principle, reckoning each contract between any two parties at a general treaty as a separate treaty of itself, amounts to twenty.

On the other hand, it is no where mentioned in the treaties between the Emperor and the Porte, 1718*; between Sweden and Russia, 1721†; or Sweden and the Porte, 1739‡; nor is it mentioned by Sweden and England 1720§; nor again in 1766‖. Spain and England, by confirming their ancient treaties at Madrid, 1721**, left the matter where it was, which, as we contend, was not to allow the maxim: so they did at Seville, 1727††; and at Aix la Chapelle, 1748, where Sardinia and Genoa also left it untouched between England and themselves‡‡. At Madrid, again, in 1750§§; and at Paris 1763‖‖. The accession of Portugal, also, to that latter treaty, by confirming all former conventions, left the subject without any alteration between herself and Great Britain. Russia and England passed by the maxim in 1734, 17[illegible], and 175[illegible]§; and in 1766 the most extended liberty that was granted was to be allowed to trade with enemies, 'observing, at the same time, the principles and maxims of the *Law of Nations* generally acknowledged.' Of course, the principle before us was not in contemplation.

Sweden and Denmark, in 1720, allowed what all commercial treaties allow at the close of a war—the liberty of

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[illegible] is also enumerated with them the treaty of Vienna, 1725, between Spain and the Emperor; which, unless, proof of the converse of the maxim is proof of the admission of the maxim itself, does certainly not go to the length of the assertion.

* Corps Diplom. 16. [illegible]. † Id. 36.
‡ Rousset Recueil Hist. [illegible] 18. [illegible]. § Corps Diplom. p. 2. 18.
‖ 1 Chalmers, 6[illegible]. ** Corps Diplom. 8. 2. 33. †† Id. 278.
‡‡ 3 Jenkinson, 374. §§ Pap. Off. c. 61. ‖‖ 3 Jenk. 17[illegible]
¶¶ Gestling's Marine Treaties.

trading

trading with each other, as in times of peace; but no mention is made at all of the maxim*; neither is it farther noticed between Sweden and Russia in 1721†. In the famous treaty, cited by Hubner amongst his examples, to prove the *conventional law* made between the Emperor and Spain in 1725, it is stipulated, as in the Spanish treaties with England, that the converse of the maxim shall exist; but no mention is made of the maxim itself‡. Notice of either one or the other rule is wholly passed over by the treaty between Naples and the Porte, 1740, (§), and in the preliminary treaty between France and Sweden, 1741 ‖. With respect to the Porte and the Barbary States, the maxim is seldom heard of in their treaties in general. We saw, indeed, that two treaties between England and Tripoli, in 1751 and 1762, and two between England and Tunis, of the same years, allowed it to the full; but in six treaties with Morocco, and five with Algiers, from 1698 to 1783, all is passed over in silence ¶; and to come back again to Europe, the old law of France disallowing any innovation, is asserted in the most positive terms, by the treaty between that country and Hamburgh, 1769.

The language of this last is somewhat remarkable. In mentioning the rejection both of the principle and its converse, it speaks not of it as a rule to which what is about to be stipulated is an exception; but lays it down rather as if the contrary were the acknowledged general principle. 'In order,' says the Fourteenth article, 'that the inhabitants 'of Hamburgh may know in what consists the freedom of 'their commerce and navigation in time of war; and that 'they may have a perfect understanding of the risks they

* Corps Diplom. 16. 30. † Id. 16. 36. ‡ Id. 16. 115.
§ Rec. de Rouss. 18. 7. ‖ Id. 18, 10.
†† Gosting's Treat. 301 et infra.

run

'run in engaging in an illicit trade, it is decided that con-
'fiſcation follows,

'I. Where goods and merchandiſe belonging to the ſaid
'inhabitants are found on board ſhips of the enemy.

'II. Where contraband goods, hereafter to be ſpecified,
'are found on board the ſhips of the ſaid city, deſtined for an
'enemy's country.'

The ſixteenth Article then makes the ſpecification; and the ſeventeenth adds, 'that it ſhall alſo comprehend '*all the effects, goods, and merchandiſe generally, whatever* '*they may be, belonging to the enemies of the King.*' The ſhip itſelf, however, is not made ſubject to confiſcation *.

And thus, according to this enumeration, not leſs than thirty-four treaties paſſed between the various Maritime States, from the year 1715 to 1780, which take no notice of the principle before us; and theſe, in addition to thirty-one, which were formed between 1715 and 1642, the epoch whence Schlegel, on the authority of Buſch, commences the ſeries of contrary conventions, make in all no leſs than ſixty-five. Seven are to be added, which, as we ſee, were actually adverſe. And the maxim is, therefore, either poſitively denied, or totally unnoticed by as many as ſeventy-two. Granting, then, what is not improbable (calculating upon the ground which has here been purſued) that there are thirty-five treaties favourable to the principle, what is to become of the proof that it forms ſo conſiderable a majority as, of neceſſity, to make the rule for all countries not bound? The power of thus binding them, our principles have wholly denied, into whatever proportion, on the one ſide or the other, the treaties may be divided. But it ſeems not a little extraordinary, that ſo new a paradox ſhould be ſtarted as law, with ſuch fragile foundations even as to the fact!

* Marſh. Treat. 254.

this

Be this, however, as it may, and leaving the evidence of treaties to prove what it can; the time was now actually faſt approaching when the claim was really to be ſet up as a pretenſion founded in the Law of Nature; and therefore belonging to what is called the primitive Law of Nations. In the laſt war alluded to (1756), the French had made ſuch havoc among Daniſh interlopers as to call forth the attention of the latter Government in the moſt ſerious manner; and there being, without doubt, many of thoſe inſtances of illegal violence which, in the wild uproar of general war, are too often inſeparable from the exertion of legal rights; they ſent over one of their learned civilians to Paris, to vindicate their claims, and, if poſſible, to ſettle a different law. This perſon was Hubner, who wrote the treatiſe which has ſo much engaged our diſquiſitions, under theſe impreſſions; and who may, therefore, be conſidered as an Advocate pleading under particular inſtructions, and, as far as that can influence an Advocate, under the impulſes of particular feelings. I do not mention this as a thing of much, if of any weight; but I cannot help obſerving, if there can be any difference, that it muſt be all on the ſide of the diſpaſſionate and unbiaſſed treatiſes of thoſe learned and virtuous perſonages of the laſt and the preceding ages, who wrote for the improvement of the world, without reference to any particular object, to any country, or to any King. Such men did not compoſe their admirable works for the accompliſhment of a miſſion, in which ſucceſs was probably to be the foundation of their fortune; but engaged in their noble occupation for the ſake of truth, conſidered by itſelf, or, at moſt, for the acquiſition of honourable fame. About ſuch men, therefore, there is thrown a ſanctity and veneration, which, with equal learning and knowledge, others cannot acquire. The difference ſeems to be no leſs than that of the Advocate and the Independent Judge; and, ſuppoſing them to be equal in all other points, theſe obſervations muſt ever attend the compariſon

between Hubner, and Vattel, Heineccius, Bynkerſhoek, Puffendorf, and Grotius!

Be it, however, as it may; it muſt be acknowledged, that, from this time, an alteration in the claims *of right*, under the Neutral Code, came to be attempted by many nations, with an ardour and vehemence not before known. What Schlegel ſays, indeed, is not true—that, from the time of Hubner's Treatiſe, men verſed in the Law of Nations almoſt unanimouſly confeſſed the juſtneſs of the axiom, that Free Ships made Free Goods *; becauſe a thing which had been exerciſed, and had reſted for perhaps ſix hundred years in natural right, could not ſo inſtantaneouſly be diſcovered to have ceaſed to exiſt, or to have loſt its foundations; but the fact is true, that endeavours began to be made to tie it up by treaty, and to enlarge the power of Neutrals at the expence of Belligerents. Till the American war, there was little room for trial; but, even after that eventful period, it is remarkable, that no attempt was made on the part of the Northern Sovereigns to obtain from Great Britain, or from France, this much wiſhed for privilege, by treaty or convention. On the contrary, a number of treaties were allowed to remain in force, in which no mention is made of the claim; and, not only this, but many articles, under thoſe treaties, are, in expreſs terms, declared to be contraband, which the principles of the Armed Neutrality were framed to ſet free. Nor here can we abſtain from obſerving upon the conduct of Denmark, under the guidance of that very miniſter, whoſe premature loſs to Europe and to Denmark is ſo much the object of Schlegel's lamentation†. If, to ſign a convention, which profeſſed to have for its object the ſolemn ſet-

* Schlegel, 10.

† Schlegel, xvi. 'On ſe rappelle par quels argumens irréſiſtibles notre grand miniſtre M. de Bernſtorff, trop tot enlevé au Danemarc et à l'Europe entiere, &c. &c

tlement of things long in difference, four days before he ſigned another, which totally annihilated the firſt; unſettled all the bonds of connection, and opened a cauſe for perpetual diſcontent, if not for perpetual war; if this was the part of a truly great miniſter; ſincerity, at leaſt, has no place in ſuch a character. In 1670, a ſolemn treaty of commerce was concluded between England and Denmark, the third article of which contained the definition of contraband; but in which, however, the words, 'other neceſſaries for 'the uſe of war,' were thought too indefinite. To remedy this, a convention was made to put the matter out of doubt, by an article to be ſubſtituted in the place of the other; by which contraband was declared to include the very ſubjects ſo often diſputed,—ſhip-timber, tar, pitch, roſin, ſheet-copper, hemp, ſails, and cordage†. This was ſigned on the 4th July, 1780. On the 8th was ſigned that declaration of the Armed Neutrality, which had long been concerting between its original members; and in which the King of Denmark declares, that he underſtands nothing under contraband, except the articles ſpecified in the third article of the treaty of 1670‡.

An inconſiſtency ſo manifeſt; an inſincerity ſo glaring; a conduct ſo open to the charge of bad faith, as is thus exhibited in this ſimple relation, requires no ſort of comment. But, for the ſake of Denmark, and of human nature; of that fair and honeſt wiſh, that the characters even of hoſtile miniſters themſelves ſhould be freed from all impure ſpots, let M. Schlegel juſtify, if he can, this conduct of his country, and her miniſter. England will rejoice in that juſtification; and, if ſhe can, will be the firſt to acknowledge it.

Reſpect for a power, whoſe conduct has long been reſpectable in the hiſtory of Europe, and which has long ex-

† 2 Marten's Treat. 102. ‡ Id. 362.

iſted in cloſe amity with this country, ought to check the impulſes of juſt reſentment; but, we cannot help obſerving, that, when ſhe ſtooped to ſuch Machiavelian attempts to amuſe, real miſchief could not be far off. Accordingly, many days did not paſs, before the world were ſurpriſed with thoſe bold declarations of the Armed Neutrality, which have been noticed in the beginning of this work*, and which claimed no leſs than to dictate what ſhould be univerſal cuſtom, becauſe certain ſtates choſe to bind themſelves to it by treaty; to ſet aſide rights of ſix hundred years enjoyment, and eſtabliſh a Law of Nature by force of Arms.

Aſtoniſhing as theſe pretenſions were, the manner in which they were received by ſome of the Belligerents was not leſs ſo. France and Spain, with low and little policy, immediately approved them. The former did not heſitate to profeſs that the war ſhe had undertaken had no other object than the liberty of the ſeas; that ſhe was ſupporting the rights of Neutrality at the price of her people's blood; and that the claims of the Armed Neutrality were no other than what were already allowed by the rules of her marine†. How this was reconcileable with truth, the hiſtory of the French law, as detailed in the foregoing pages, is beſt able to teſtify.

The Spaniſh anſwer to the Ruſſian Declaration was not quite ſo unqualified, but ſtill full of approbation.

It notices, however, the practice which Neutrals had fallen into of providing themſelves with *double papers, and other artifices*; from which detentions, and other diſagreeable conſequences, had ariſen. At the ſame time, on the whole, it perfectly acceded to the Armed Neutrality‡. And thus, two of the greateſt Maritime States of the world, as well as

* Introduction. † Ann. Reg. 1780. 350. ‡ Id. Ib.

the

the moſt antient monarchies; one of them in particular, renowned for honour and a height of ſpirit which ought to have deſpiſed the meanneſs of acquiring immediate advantage at the expence of ſacrificing the general intereſt in time to come; ſtooped to the narrow policy of weakening a great principle of the Law of Nature itſelf, in order to acquire a temporary advantage in a war already unequal.

Even if they were ſincere, their mode of action, as well as their language, ſpoke little of true and ſimple dignity. In that caſe, they ought themſelves to have demonſtrated their ſincerity by the clearneſs of their previous conduct. As it was, they allowed the youngeſt State of Europe, under the direction of an energetic woman, to get the ſtart of them in aſſerting the privileges, which they, in their actions at leaſt, had not attempted to aſſert. If they were not ſincere, no obſervation need be made; but, in the one caſe or the other, I know nothing ſo undignified or ſo degrading, as the anſwers of the Courts of Verſailles and Madrid to the Ruſſian Declaration.

Solitary, and abandoned by the whole world; ſtruggling with a fatal ſchiſm amongſt her own children; oppoſed, with diminiſhed reſources, to all the greateſt Maritime Powers of Europe, to the Continent of America, and almoſt to the Continent of Aſia; without a ſingle ally, and before her ancient vigour had ſhone out under the direction of her favourite Admiral, to the diſmay of her opponents; nothing could be more firm, or conſequently, in ſuch a ſituation, more honourable, than the conduct of Great Britain. She did not diſclaim the rule of action upon which ſhe had ever proceeded; ſhe did not approve of the natural juſtice of the new theory aſſerted; ſhe did not 'applaud the principles 'and views of the Empreſs, as partaking of the ſame ſen-'timents*;' but ſhe firmly, though prudently, anſwered,

* See the French Anſwer, ubi ſup.

that ſhe ſhould act according to the clear principles of the acknowledged Law of Nations, where no treaty had modified that law; and that ſhe would abide by her treaties where they actually ſubſiſted. In particular, with reſpect to Denmark, ſhe reminded her of the treaty then exiſting, which nothing could overcome but *mutual* agreement; and which, ſhe ſaid, ſhould ſtill, therefore, be the ſole baſis of her conduct.

With regard to Sweden, ſhe alſo relied on the treaty which had always regulated their mutual actions; one article of which had expreſsly marked out, that the goods of enemies ſhould be ſeized on board the ſhips of friends. This engagement, ſhe aſſerted, could not be violated without breaking the friendſhip which had ſo long ſubſiſted between the countries, and formed ties from which neither could be ſet free, except by the conſent of both. 'The 'King, therefore,' ſays the anſwer, 'will adhere to theſe 'engagements as an inviolable and ſacred law, and he will 'maintain it as ſuch *.'

The obſervations which might be made on the Armed Neutrality open a vaſt field; but much has been foreſtalled by the preceding matter of this treatiſe. We cannot, however, help here adverting to a ſtrange and glaring inconſiſtency which appears on the face of it. One great object of the Convention was to eſtabliſh a difference between unprotected merchant ſhips, acting for themſelves, and thoſe protected by convoy, acting under command. The reaſon for this, as it was ſaid, was founded in the minute and ſtrict enquiry which would be made in the latter caſe, *before the goods were laden*; in conſequence of which, and of which

* Marten's Treat. iv. 368. And ſee a Collection of Public Acts and Papers relating to the Armed Neutrality; printed for Hatchard: p. 130 to 137.

above

alone, very ſtrict paſſports, on oath and rigorous examination, were to be taken out: ſo that the faith of the State was pledged to take care that no illicit commerce was attempted by thoſe who put themſelves under the *national* flag. The ſoundneſs and cogency of this ſort of reaſoning we ſhall examine in its proper place; for the preſent, we will take it for granted, that the reſpective Governments did actually intend, and had in reality the means to carry this ſpecious deſign into execution. Now, in turning to the fifth article of the Armed Convention *, we find that, ſhould it happen that the merchant veſſels of one of the powers ſhould be in a latitude where no ſhips of war of the ſame nation were ſtationed, and where they could not have recourſe to their own convoys; then the commander of the ſhips of war of the other power, if he be requeſted to do ſo, ought, in good faith, and ſincerely, to afford them the aſſiſtance of which they may be in need; and in ſuch a caſe, the ſhips of war and frigates of the one power ſhall grant protection and aſſiſtance to the merchant veſſels of the other; provided that theſe ſhall not have carried on any illicit trade, or any trade contrary to the principles of Neutrality.

Upon this article, the queſtion immediately ariſes, how it is poſſible for a foreign, though an allied ſhip of war, or even one bearing the national flag, to be able to anſwer for the particulars of the cargo, or of the previous voyage and tranſactions, of a private merchant ſhip, which happens to meet him by chance in a latitude where ſhe can find no cruiſers of her own nation? What becomes of the ſolemn enquiry to be made on ſhore as to the nature of the cargo, in order to inſure its innocence? As it is the *national* flag which demands, as the price of its protection, that the particulars ſhould be made out, in order that the *national* faith

* Collect. of Pub. Acts, &c. 113; Marten's Treat. 4.

may be ſafely pledged, which is the ſpring and ground-work of the whole right aſſerted; how is it that Ruſſia is ſo prompt to anſwer for a ſolitary Swede, or Sweden for a Ruſſian, or Denmark for either a Swede or a Ruſſian, coming from they know not what latitudes, and provided with they know not what muniments, but on whoſe ſimple word they are to ſtrive, in even bloody conteſt, rather than ſuffer them to be examined?

It cannot be on the faith of papers, the agreement between which and the cargo they have had no opportunity of examining: it cannot be on the faith of the maſter's word; for neither papers nor word are more than what are offered to the ſearching Belligerent in caſes without convoy, in which ſearch is allowed by the confederated powers themſelves. What magic it is which throws this ſort of ſacredneſs about a merchant veſſel the moment it meets the flag of a ſhip of war, whether of its own or of another country; thoſe, and thoſe only, can determine who framed the ſtipulations of the Armed Neutrality, as they ſaid, on principles of natural juſtice.

Theſe ſort of obſervations are perpetually ariſing, and muſt perpetually ariſe from the very nature of the ſubject; ſo true it is, that when once found principle is departed from, it is in vain to act, or to plan any ſcheme of action which ſhall regularly be found to ſquare with it. Had the Armed Alliance, profiting by the opportunity of the times, by the ſuppoſed weakneſs of Great Britain, and the flagrant meanneſs of her enemies, come boldly forth in the teeth of juſtice, inſtead of aſſuming its garb; had it thrown off its treaties by force, or made war to break them, and for that purpoſe alone; till diſtreſs ſhould have extorted an acquieſcence under new ſtipulations; the way would have been clear, though made by violence; and, at leaſt, would never have been clogged with inſuperable inconſiſtencies, always ariſing from the pretence, that what they did was founded upon

natural

natural right. In this reſpect they engaged in a gigantic conteſt far beyond their ſtrength, becauſe beyond the power of humanity, to change the decrees of reaſon, or to turn truth into falſehood.

And this is the cauſe of the difficulties under which the reaſoning of the principle, and the conduct of thoſe who profeſs it, muſt ever labour. If really this new rule is that drawn from Nature, or that which binds from the majority of the conventions upon it, who is to ſay, when it began, how long it is to laſt, when it is to ceaſe? Who is to act upon it? What Court is to be governed by it? When are individuals and Courts to bend to a new law? It happens peculiarly, that, the very year before France, and in the very year in which Spain acceded to the principles of the Confederacy, as founded in juſtice, emanating from natural liberty, or derived from univerſal convention; each of them had formed treaties, or made ordinances, directly ſubverſive of the whole principle. In September 1779, ſeven months before the French anſwer to the Ruſſian Declaration, France made a treaty with Mecklenburg, framed exactly on the ſame rule with that with Hamburgh a few years before*; in which contraband was made to include all enemy's property, of whatſoever nature, on board the Mecklenburg ſhips†. Far beyond this went Spain, in her ordinances with regard to Neutrals, in the year 1780 itſelf, and only one month before her acceſſion to the principles of the alliance. In thoſe ordinances ſhe ſeemed to care little for the duty preſcribed to her by her treaties, provided it was neceſſary to oppoſe the operations of Great Britain where there was no treaty. In thoſe ordinances ſhe declared, that, with reſpect to Britiſh merchandiſe on board neutral veſſels, ſhe muſt follow the rule

* See page 152. † 2 Marten's Treat. 39.

of

of Great Britain herſelf with regard to cargoes of the ſame nature; 'in order,' ſays the ordinance, 'by this re-'ciprocity (a moſt miſtaken one!) to avoid the enormous 'inequality, the prejudice, and even ruin, which other-'wiſe might be brought upon the Spaniſh commerce!'

That Spain ſhould fall into this conduct, and even found it upon a ſuppoſed rule of reciprocity, is not ſurpriſing; but it baffles all attempts to reconcile it with conſiſtency, that this ſhould be done by one who thought the principles of the Armed Neutrality were the true Neutral principles. A very little enquiry into the meaning of things muſt ſhew us, that this conduct was reciprocal, even in their own miſtaken ſenſe of that word, only with regard to Great Britain; while the innocent Neutral, with whom probably ſhe was bound by treaty to a different conduct, was, without ſcruple, made the ſacrifice. When, for example, ſhe was bound by treaty with Sweden to allow 'Free Ships 'Free Goods,' between whom and Great Britain the contrary ſtipulation exiſted, could there be any reciprocity in breaking that treaty with Sweden, becauſe Great Britain acted upon the proviſions of her's? In ſuch caſe, even ſuppoſing there was the ſame ſort of treaty between Great Britain and Sweden, it was neither more nor leſs than to ſay; becauſe my enemy has broken his duty, and injured and pillaged you, I alſo muſt injure and pillage you, or my commerce will be ruined. A child would detect the fallacy of the argument!

The ordinance goes on, however, to ſtate heavy complaints againſt Neutral interference in the war;—that interference which Spain was, in a month, to ſanction with her perfect approbation, as ariſing from natural right. It complained, that they eluded the blockade of Gibraltar; that they had frequently double ſets of papers, and other diſguiſes, in order to ſcreen *the real owners of the cargoes*. 'Though theſe facts,' ſays the ordinance, 'are notorious,

'and

'and have been proved by formal proceſs, yet theſe per-
'verſe men, eager for gain, have diſturbed all Europe with
'their clamours; aſſerting falſely, that orders had been
'iſſued to detain and ſeize all Neutral veſſels which paſſed
'the Straits; when, in fact, the orders were expreſsly,
'only to detain ſuch ſhips as were ſuſpected, either from
'the courſe they ſteered, or the papers they produced, *and*
'*ſuch as carried enemy's goods or proviſions!*' In conſequence of theſe reaſons, the ninth article goes on to enact, that when enemy's property ſhall be found on board Neutrals in future, it ſhall be ſeized and confiſcated, paying the freight *. One month afterwards, ſhe approved the principles of the Armed Neutrality.

Where views of policy, however, are ſo changeable, and principles of law ſo little fixed, perſeveranc in any given line of conduct is not to be expected. Accordingly, within theſe few years, Spain, on entering into the war with France in 1793, came round again to the old rule, when ſhe ſtipulated, by a convention with Great Britain, that their Majeſties ſhould unite all their efforts on this occaſion of common concern to every civilized State, to prevent other powers, *not implicated in the war*, from giving, in conſequence of their Neutrality, any protection whatever, directly or indirectly, to the commerce or property of the French, on the ſea, or in the ports of France†. Exactly the ſame ſort of convention was entered into by Ruſſia herſelf with Great Britain, in the ſame year‡; and the inſtructions given by the Empreſs to the commander of her fleet (that very Empreſs who dictated, guided, and ſup-

* See the letter of the Count Florida Blanca to the Marquis Gonzalles de Caſtejon, pour ſervir de Réglement concernant la Navigation des Neutres, 13 March, 1780.
Marten's Treat. 4. 268, *and the ninth Article.*
† Collect. of Pub Acts., &c. 146. ‡ Id. 142.

ported

ported the Armed Neutrality of 1780) demonstrate, in the most forcible manner, the change of her sentiments.— Those instructions command him 'To prevent all neutral 'vessels from carrying stores or provisions to France.' They state that 'Denmark, with its accustomed weakness, 'and preferring even an ideal gain to the sound consider-'ations of policy, had refused to consent to her just de-'mands; therefore all ships are to be stopped and searched, 'even those under convoy; which, if resisted, the honour 'of the Russian flag is to be maintained, and force repelled 'by force; without pursuing, in case of flight, the vessels 'composing the convoy; putting only in execution what is 'prescribed, *to prevent any navigation to the enemy's ports.* *' Such was the tone of Russia, becoming Belligerent, in 1793, to her very confederates in the Armed Neutrality: nor had Sweden been backward in renouncing the principles of that celebrated alliance.

A very important circumstance is here to be remembered; that, although that alliance professed to delineate the principles of universal justice, its stipulations were only to continue during the war. It held out, indeed, that measures were to be taken as a guide to new engagements; and the King of Sweden, in particular, was anxious to propose a congress, in which the rights, both of Belligerents and Neutrals on this subject, should be for ever settled; but this was not done. After the peace, therefore, of 1783, the contracting parties were left alone to review their opinions: if well founded, to bring them again into action; or, if ill founded, to renounce them altogether, when next called upon to assert or reject them, according to the exigencies in which they should be placed. Sweden, as long, it is to be supposed, decided that her conduct had been wrong; for Sweden, in the

* Collection Public Acts, &c. 132. † Id. ib.

next war she waged, most absolutely renounced the principle as a Belligerent*. It would be too gross an affront to its justice, to suppose that it has two lines of conduct; one as Neutral, the other as Belligerent; we will, therefore, rather suppose that she saw the errors into which the aspiring genius of Russia, or her own impulses, heightened, perhaps, by the incidental injuries inseparable from war, had betrayed her; and that she thought, as her treaties bade her think, that the principle before us could only be matter of convention.

We have already noticed the strange and inconsistent, not to say unjust conduct of Denmark on closing with the Armed Neutrality. Denmark at least, therefore, in this instance, can furnish no example of a State versed in the true laws and principles of that natural justice which she armed herself to impose upon the world as the universal and invincible rule of its conduct. Very few years after having so armed herself, and still fewer before she acceded to the present alliance, both Denmark and Sweden, (most remarkably, the only two powers which Schlegel recollects to have formed treaties *renouncing* the principle) renewed that renunciation, by declaring, in their convention of 1794, that they claimed no advantages but what were clearly founded in all their respective treaties with the different powers at war†. Now, 'Free ships Free goods,' was at least not one of these advantages; since each of them had tied himself down with Great Britain,—I will not say to renounce, but not to demand it,—above one hundred years before, by the treaties we have mentioned in the last century; which

* Schlegg. 14, 15. 'Dans la guerre que le Roi Gustave III. entreprit contre la Russie, il se laissa entraîner, par une politique de circonstance, à oublier, les mêmes principes dont il venoit si récemment de se montrer le zélé et courageux défenseur.'

† [illegible] Note and Papers, &c. p. 162.

treaties

treaties were never abrogated. Denmark alſo, in particular, in her inſtructions to her merchants, February 22, 1793, confirmed her treaty, and again renounced the claim, when ſhe ſtated that the treaty of 1670 with England, ſtipulating, that, amongſt a ſhip's papers there ſhould be a certificate to prove *that the cargo belongs to a Neutral Power*; ſhe had, therefore ordered her magiſtrates to deliver ſuch neceſſary certificates *.

About this time alſo Pruſſia, another of the powers which had acceded to the Armed Neutrality, joined as a Belligerent in thoſe general ſtipulations with Great Britain, 'to 'prevent other powers, not implicated in the war, from 'giving protection directly, or indirectly, to the commerce 'of the French on the ſea, or in the ports of France†.'

A great variety of powers, compoſing nearly all Maritime Europe, had acceded to the principles of the Armed Neutrality. America, the cauſe and object of the eventful war which gave it birth, ſanctioned of courſe what was ſo much to her advantage. She was bound by all her great views of trade; by all on which her exiſtence depended, by every tie of gratitude to her friends, and by every feeling of reſentment againſt Great Britain, to broach, uphold, and diſſeminate the doctrine far and wide, as ariſing immediately from the rights of Nature, or at leaſt founded in ſuch univerſal convention, as to acquire every where the force of law. Of the great trading nations, however, America is almoſt the only one that has ſhewn conſiſtency of principle. The firmneſs and thorough underſtanding of the Laws of Nations, which, during this war, ſhe has diſplayed, muſt for ever rank her high in the ſcale of enlightened communities.

Her treaty with France, 1778, was formed on the ſtipulations of 1780, by which ſhe was ever ready to

* Collection of Acts and Papers, p. 137, the ſixth article. † Id. 146.

abide;

abide; her treaty with England, 1794, gave up the whole of thoſe ſtipulations. In the ſeventeenth article, ſhe agreed that enemy's property on board her veſſels ſhould be confiſcated, and that on juſt ſuſpicion the veſſels themſelves might be detained, and carried into the neareſt port, for the examination and adjudication of the property. She had a right to make both theſe treaties; and, under a caſe of ſome difficulty, by both ſhe abided.

In 1798, the ſtateſmen of France, amongſt other crudities, ſet up the ſtrange aſſertion, that, as the Americans were bound to treat them as the moſt favoured nation, they ought not allow French property to be ſeized by Britiſh cruiſers on board American ſhips, while they prevented the ſeizure of Britiſh property in the ſame ſituation by the French; and they threatened war for not complying with this repreſentation.

The American anſwers to theſe ſophiſtries are models of dignified and convincing reaſoning. Whilſt they rejected all ſuſpicion of being influenced by fear, from the orders which they gave for warlike preparations, their miniſters attacked the French arguments with irreſiſtible power. 'Before the treaty with Great Britain,' ſaid one of their notes to the French Government, 'the treaty with France exiſted. 'It follows, then, that the rights of England, being neither 'diminiſhed nor increaſed by compact, remained preciſely 'in their natural ſtate, which is to ſeize enemy's property 'wherever found: and this is the received and allowed prac-'tice of all nations, where no treaty has intervened.' A new *Law of Nations*, it is pretended, was introduced by the Armed Neutrality; but who were the parties, and what was their object? 'The compact was in its own 'nature confined, with reſpect to object and duration. *It did* '*not purport to change, nor could it change permanently and* '*univerſally the rights of nations, not becoming parties to it.* 'The deſire of eſtabliſhing univerſally the principle, that 'Neutral

'Neutral bottoms ſhall make Neutral goods,' is perhaps felt 'by no nation on earth more ſtrongly than by the United 'States. Perhaps no nation is more deeply intereſted in its 'eſtabliſhment; but the wiſh to eſtabliſh a principle is eſ-'ſentially different from a determination that it is already 'eſtabliſhed. The intereſts of the United States could not 'fail to produce the wiſh; their duty forbids them to indulge 'it, when decided on a mere right*.'

'The complaints of the French,' ſaid another note of the American Miniſter to his Preſident†, 'had reference, amongſt other things, to the abandonment, by the Americans, of their Neutral rights, *in not maintaining the pretended principles of the modern Law of Nations*, that Free Ships make Free Goods; *and that timber and naval ſtores are not contraband of war*. The neceſſity, however, for the ſtrong and expreſs ſtipulations of the Armed Neutrality itſelf, by all the various powers which joined it, ſhewed (as the note went on to ſtate) that thoſe maxims were not in themſelves law, but merely the ſtipulations of compact; that, by the real law, Belligerents had a right to ſeize the property of enemies on board the ſhips of friends; that treaties alone could oblige them to renounce it; and that America, therefore, could not be accuſed of partiality to Great Britain, *becauſe ſhe did not take arms to compel them to renounce it*‡.'

As far, then, as we can collect from theſe reaſons and principles, America will, at leaſt, not oppoſe the object of this treatiſe. By the firmneſs ſhe diſplayed ſhe overcame the threats of France; and by the accuracy of her reaſoning ſhe triumphed in the argument. Unhappily, however, all did

* Collection of Acts, &c. 198, et infra.

† Mr. Pinkney to General Waſhington.

‡ Debrett's State Papers, 5. 281, 286. The whole letter, which is an anſwer to Adet, the French Miniſter's complaints, deſerves the beſt attention. It is an admirably reaſoned piece of diplomatic repreſentation.

not ſhew equal accuracy of underſtanding, or equal regard to the obligations of treaty.

We have ſeen the direct renunciation of Ruſſia, in 1793, of the principles which governed her in 1780. In the inſtructions which developed this renunciation, ſhe, indeed, made a difference between common wars and that ſhe was about to wage; but, as Denmark had reſolved upon Neutrality, no part of the reaſoning could be binding upon her. 'As theſe meaſures,' ſaid the inſtructions, 'are taken againſt arrant villains, who have overturned all duties towards God, the Laws, and the Government; and have even taken away the life of their own Sovereign; the means of puniſhing theſe villains, and of making them re-enter the way of truth, after having been enveigled into crimes, ought, in juſtice, to be employed *in ſuch a manner as to accelerate and enſure ſucceſs in ſo ſalutary an affair**.'

We have no heſitation in ſaying, that theſe inſtructions were a groſs and flagrant invaſion, on the part of Ruſſia, of the independent Sovereignty of Denmark. Had France been even more blood-ſtained than ſhe is with cruelty, perjury, and crime of every ſort; although it might be fair ground for any other nation to interfere, if ſhe choſe, by way of puniſhing offences againſt the Laws of Nature; yet no power that ever was aſſumed under the Law of Nations could give a right to that avenging nation to call upon another for aſſiſtance againſt its will. This pretence, therefore, was well anſwered by the Miniſter of Denmark, when once it had reſolved to acknowledge the Nation of France.

But what, after ſo glaring a departure from its principles, are we to think of the conſiſtency of the Ruſſian Court, when, finding it neceſſary to change its public meaſures, it

* Collect. of Acts, &c. 149.

recurs back again to its Declarations of 1780, breaks down the whole principle that governed its late conduct, and once more becomes the champion of Neutral uſurpation? 'Europe had applauded,' ſays the Declaration of the 16th Auguſt, 'the meaſures which were taken by the greater 'part of the Maritime Powers to render ſacred the prin-'ciples of a wiſe and impartial Neutrality, when, in 1780, 'a maritime war between two great Powers made it in-'cumbent on the reſt to provide for the ſafety of the com-'merce and navigation of their ſubjects. Every act found-'ed upon juſtice muſt meet with univerſal approbation; 'and this was, in effect, merely re-eſtabliſhing the prin-'ciples of the Rights of Nations*.

A departure ſo ſtrong and ſo pointed from the laſt governing principles of the conduct both of Ruſſia and Sweden could only prepare the way for the late moſt eventful meaſure, big with fate to the nations concerned, and putting a laſt hand to the chain of their inconſiſtencies. The convention of the 16th of December renews and gives additional vigour to the Armed Neutrality of 1780, and engrafts upon it an entire new and moſt momentous article, which ſtates:

'That the declaration of the officers who ſhall com-'mand the ſhip of war or ſhips of war of the King or 'Emperor, which ſhall be convoying one or more merchant 'ſhips, that the convoy has no contraband goods on board, 'ſhall be ſufficient; and that no ſearch of his ſhip, or the 'other ſhips of the convoy, ſhall be permitted. And, the 'better to inſure reſpect to thoſe principles, and the ſtipu-'lations founded upon them, which their diſintereſted wiſhes 'to preſerve the impreſcriptible rights of Neutral Nations 'have ſuggeſted, the high contracting parties, to prove

* Collect. of Acts, &c. 243.

'their ſincerity and juſtice, will give the ſtricteſt orders 'to their Captains, as well of their ſhips of war as of their 'merchant ſhips, to load no part of their ſhips, or ſecretly 'to have on board any articles, which, by virtue of the 'preſent convention, may be conſidered as contraband: 'and, for the more completely carrying into execution this 'command, they will reſpectively take care to give direc-'tions to their Courts of Admiralty to publiſh it, when-'ever they ſhall think it neceſſary; and to this end, the 'regulation which ſhall contain this prohibition, under the 'ſeveral penalties, ſhall be printed at the end of the preſent 'Act, that no one may plead ignorance.'

To the old ſtipulations renewed by this convention, together with this important article engrafted upon them, Denmark has acceded—Denmark, who, to uſe the language of her great ally, prefers, with her accuſtomed weakneſs, an ideal gain to the ſound conſiderations of policy *. Pruſſia has alſo given it all its ſupport, prepares its forces, and ſeems hot for the conteſt. Our country does not ſhrink from it, engaged as ſhe is in the moſt arduous of her wars; and Europe awaits the event in fearful expectation.

And thus we have conducted this important, this intereſting, this entangled, but not difficult, ſubject through all the mazes of adverſe arguments, adverſe treaties, and adverſe conduct. That no light might be wanting for its elucidation, we have *endeavoured*, at leaſt, to deduce its hiſtory from its firſt exiſtence, through all the changes tha were attempted, reſiſted, or allowed upon it in all ages by whatever countries and whatever men. The deduction has been long, but, I hope, not unprofitable. A

* See the Inſtructions to the Ruſſian Admiral Tchitchagoff, Collect. of Acts, 149.

point

point of ſuch mighty conſequences, at this moment, in the affairs of Europe and of the world, can never be too much examined, ſifted, or tried.

Whether, after this examination, any doubt can remain upon the foundations of the Neutral pretenſion, under whatever ſhape the argument may be framed; whether it can ſtill be imagined, either from the force of general reaſoning, the ſtrength of authority, the uniformity of treaties from times of old, or the conſiſtent and recent conduct of Neutrals themſelves, that the right which we reſiſt is the natural right of mankind; I myſelf am unable to judge. The enquiries of my own mind have produced ſatisfaction, that the natural right is on the ſide of the Belligerent; and that the neutral claim, where allowed, is a matter of the pureſt convention. As to the poſition, that, where the majority of treaties have fixed upon any given point between the powers that contract, it ſhall form the law for thoſe which have not contracted, it is really too abſurd to demand one moment's attention. It can only be made uſe of by jugglers and robbers of the day, to carry a point of temporary rapacity; or by viſionary enthuſiaſts, mad in the purſuit of a vain philoſophy. I give them credit for their motives and their ſincerity; and I mean them no diſreſpect when I ſay, that, amongſt the honeſt men, it can only be found in ſuch theories as leap from the fancy of Hubner or the dreams of Schlegel!

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Indiſpenſable profeſſional avocations have obliged the Author to leave the general ſubject of his Treatiſe here—only, however, for a ſhort time.

The firſt Propoſition, forming a complete ſubject in itſelf, he has been induced to publiſh it apart. The other Propoſitions will follow all together, and the whole will form a volume.

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